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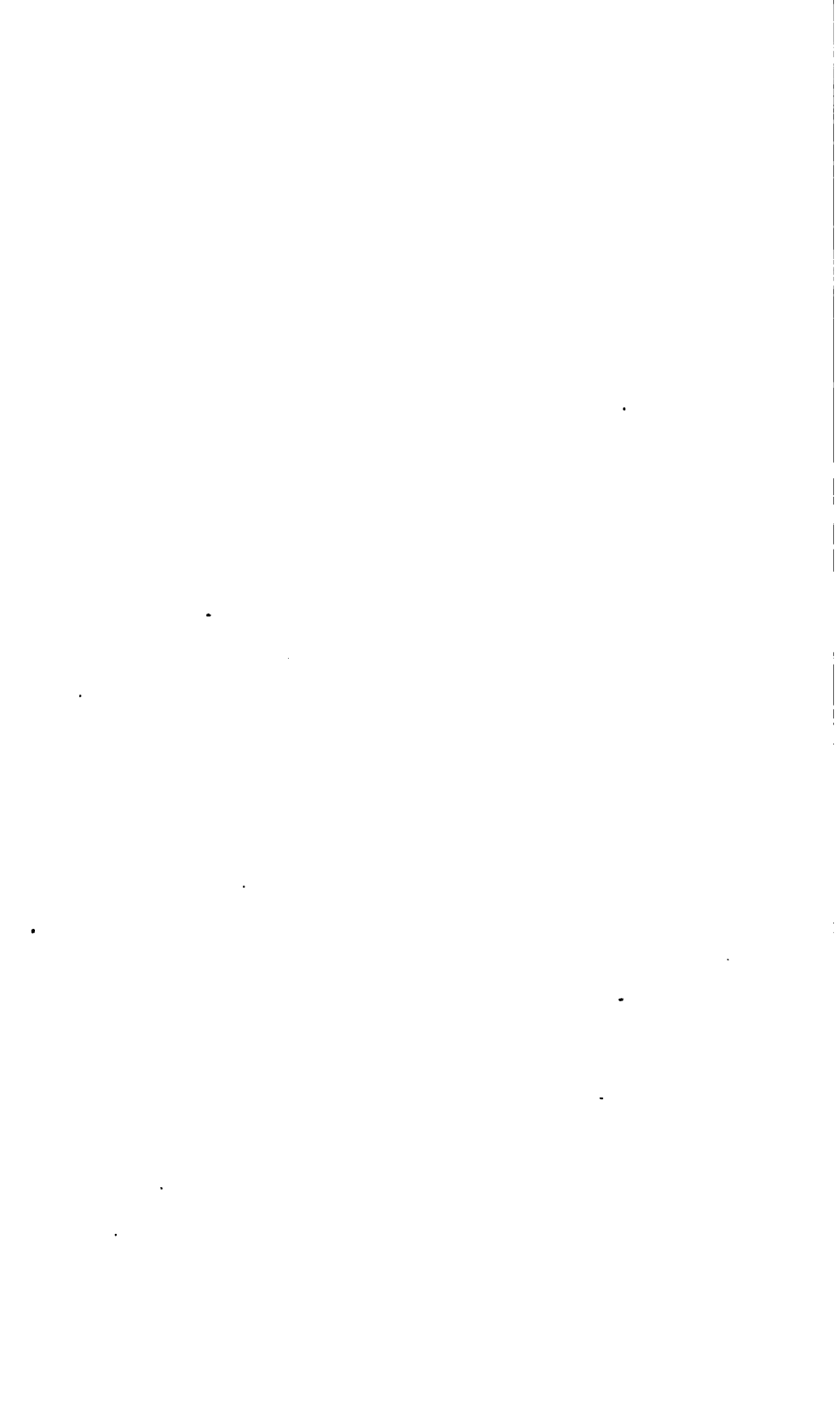
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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CON-  
TEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS,  
WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

VOL. CIV.

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SAMUEL DICKSON, Esq.,  
EDITOR.

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1865.

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**OF**  
**THE COURT OF COMMON PLEAS,**  
**DURING THE PERIOD OF THESE REPORTS.**

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The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.  
The Hon. Sir JAMES SHAW WILLES, Knt.  
The Hon. Sir JOHN BARNARD BYLES, Knt.  
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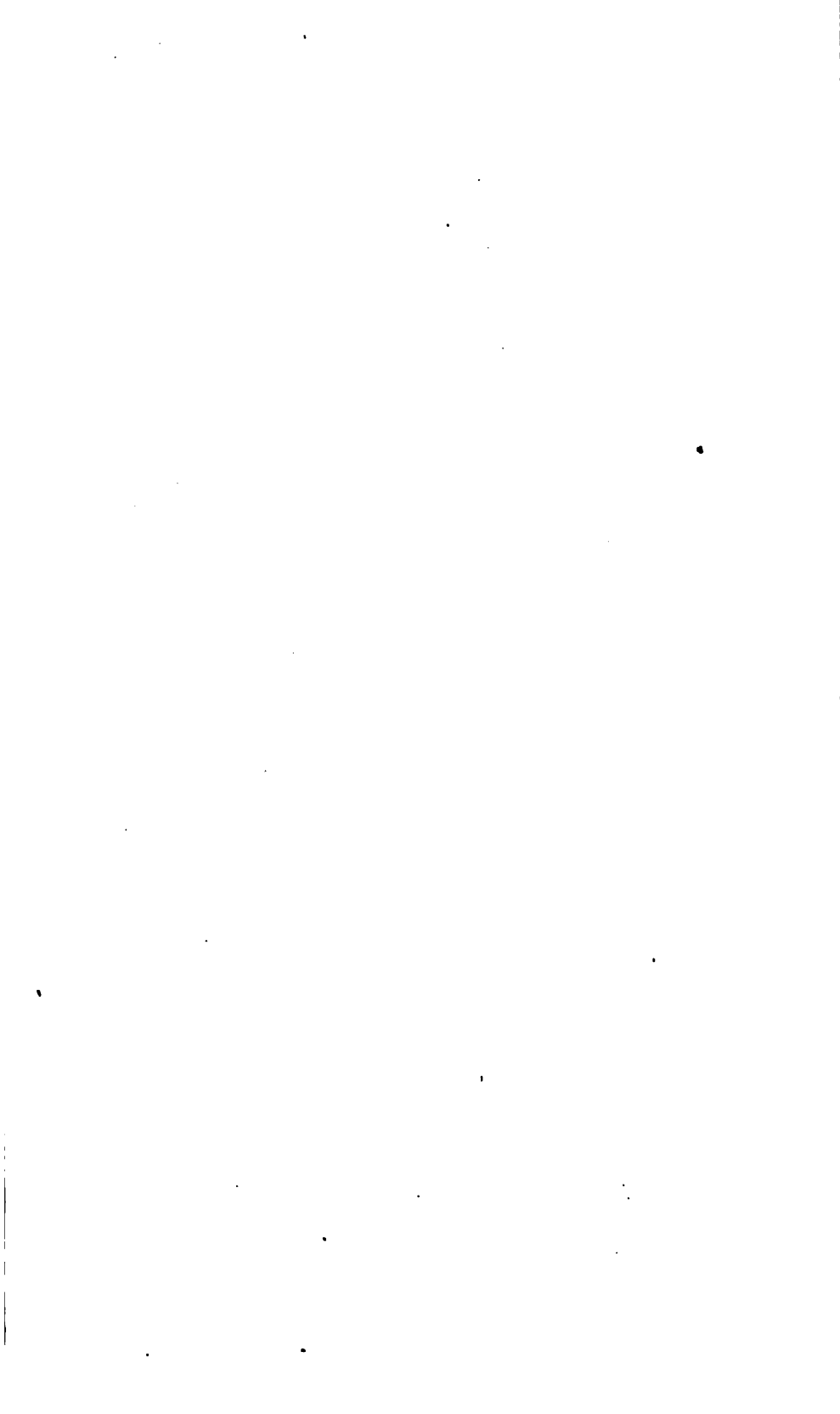
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# CASES

ARGUED AND DETERMINED

IN

## THE COURT OF COMMON PLEAS,

IN

Easter Term,

IN THE

TWENTY-FIFTH YEAR OF THE REIGN OF VICTORIA. 1862.

---

The Judges who usually sat in banco in this Term, were,—

ERLE, C. J.,  
WILLES, J.,

BYLES, J., and  
KEATING, J.

---

### MEMORANDUM.

IN the vacation preceding this Term, the following gentlemen were respectively appointed Her Majesty's Counsel learned in the Law:—

William Mathewson Hindmarch, Esq., of Gray's Inn, and of the Northern Circuit,

George Boden, Esq., of the Inner Temple, and of the Midland Circuit, and

Thomas Weatherley Phipson, Esq., of Lincoln's Inn, and of the Oxford Circuit.

In the course of the Term, they were called upon to take their seats within the Bar.

---

\*ANNE WITHERLEY, Administratrix, &c., v. THE  
REGENT'S CANAL COMPANY. April 15.

[\*2

No action will lie for the consequences of a negligent act, where the party complaining has by his own want of due care and caution been in any degree contributory to the misfortune.

A swing-bridge over a canal crossing a public highway, when turned back for the passage of a barge along the canal, left a gap on the side of the road without any fence towards the water. A., being upon the bridge whilst it was in this state, and the spot being dark, incautiously stepped back and fell into the water and was drowned. In an action by his widow and administratrix against the canal company (under Lord Campbell's Act, 9 & 10 Vict. c. 93), the jury were told, that if they thought there had been negligence on the part of the company,

and no want of proper care and caution on the part of the deceased, the plaintiff was entitled to a verdict; but that, if they thought that the deceased had by his own negligence contributed to the accident, they must find for the defendants:—Held, a proper direction, and that, upon the facts, the jury were warranted in finding for the defendants, although they were of opinion that the bridge was not secured as it should have been.

THIS was an action by the plaintiff, as administratrix of her late husband, against the Regent's Canal Company, under Lord Campbell's Act, 9 & 10 Vict. c. 93, for so negligently keeping a bridge over the canal on a public highway as to cause the deceased to fall into the water.

The cause was tried before Wightman, J., at the last Assizes at Kingston, when the following facts appeared in evidence:—The deceased having occasion to pass over one of the Company's swing-bridges crossing the canal at a place called Queen Street, Poplar, went on to the bridge, which was swung back to admit a vessel to pass through (and which it appeared the public were permitted to do), and, stepping back inadvertently, fell through a small gate leading to the water, which was closed when the bridge was closed, but was left unguarded when the bridge was swung, and dropped into the water and was drowned. The accident occurred in the month of October, at 8 o'clock in the evening; and it was proved that there was no light on that side of the way.

The learned Judge, after observing to the jury that the deceased ought not to have gone upon the bridge whilst open, told them, that, if they thought there had been negligence on the part of the Company, and no want of proper care and caution on the part of the \*3] deceased, the plaintiff was entitled to a verdict; but that, if they thought that the deceased had by his own negligence contributed to the accident, they must find for the defendants.

The jury intimated an opinion that the bridge was not secured as it ought to have been; but they found their verdict for the defendants, on the ground that the deceased had by his own negligence contributed to his death.

*Ribton* now moved for a new trial, on the grounds of misdirection and that the verdict was against the evidence.—The direction of the learned Judge was hardly warranted by the more recent authorities. In *Greenland v. Chaplin*, 5 Exch. 243,† it was held that a person who is guilty of negligence, and thereby produces injury to another, cannot set up as a defence that part of the mischief would not have arisen if the person injured had not himself been guilty of some negligence. Pollock, C. B., in giving the judgment of the Court in that case, says: "I entirely concur with the rest of the Court, that a person who is guilty of negligence, and thereby produces injury to another, has no right to say, 'Part of that mischief would not have arisen if you yourself had not been guilty of some negligence.' I think that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action: and certainly I am not aware, that, according to any decision which has ever occurred, the jury are to take the consequences and divide them in proportion according to the negligence of the one or the other party." In *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67), and *Hounsell v. Smyth*, 7 C. B. N. S.

731 (E. C. L. R. vol. 97), the owners of land near to a public highway were held responsible \*for accidents arising from insufficient [\*4 fencing, though the injuries complained of arose from the parties having incautiously deviated from the public way. [ERLE, C. J.—To entitle the plaintiff to maintain this action, she must show that the accident arose from the negligence of the defendants or their servants.] The verdict is at all events against the weight of the evidence. The case of *Manley v. The St. Helens Canal and Railway Company*, 2 Hurlst. & N. 840,† is precisely in point. There, certain undertakers of a navigation being incorporated for the purpose of making a canal, and empowered by statute (28 G. 2, c. viii.) to take tolls to their own use and behoof, were authorized “to make such and so many bridges as and where they should think requisite and convenient, and to amend, heighten, or alter any bridges, and to turn or alter any highways in, through, upon, or near the rivers, cuts, or canals, as may in any ways hinder the navigation or passage thereon.” The Company made a cut through a public highway near St. Helens, which was then a small village, and carried the highway over the cut so made by a swivel-bridge. By a subsequent Act (11 G. 4, c. l., s. 1), to consolidate and amend the former Act, it was recited “that the navigation, cut, or canal, and other the works authorized to be made by the recited Act, have been long since made and completed;” and, by s. 48, the Company were empowered to maintain the canal, bridges, &c. By the 11 G. 4, c. l., s. 124, all persons were to have free liberty with boats to navigate the said canal for the purpose of conveying any goods, &c. By s. 141, penalties were imposed on persons leaving open draw-bridges, &c., after boats had passed. A boatman having opened the swivel-bridge to allow his boat to pass through, a person who was coming along the road (at 8 o’clock in the evening of the 22d of October) walked into the \*water and was drowned. It [\*5 appeared, that, when the bridge was open, the end of the highway abutting on the canal was wholly unfenced. Two lamps had formerly been kept burning, of which one had been removed, and the other was out of repair. The jury found that the deceased was drowned by reason of the neglect of reasonable precautions on the part of the canal Company, without any negligence on his own part. And, upon this finding, it was held that the defendants were liable. Martin, B., in giving judgment, there says: “It is perfectly clear what is the common-law obligation of persons who make canals of this kind. They may make a bridge, but common sense points out it must be a proper bridge, and fit for travelling over: and I agree with the Lord Chief Baron, that, if we were now discussing what kind of bridge it ought to be, I should say a bridge suitable to the present state of society. I have no doubt, that, when this bridge was built, the place near it was a small village: now it has thousands of inhabitants; and to hold that the same bridge which would suffice formerly will do so now, when the place has become a great manufacturing town, would be utterly contrary to reason and good sense. Courts of law must look at these matters with reason and common sense; and these tell us that undertakings of this sort must be conducted so as to meet the exigencies of society. Is it fitting, then, that, in the town of St. Helens, there should be a bridge which, when opened, as it may

be at any hour of the day or night, shall leave a gulf in the highway entirely without protection? That is a question for the jury; and all persons would concur that the only verdict they could have found was that which they have found. Had they found the contrary, I should have dissented from their verdict, and thought it a fit one to set aside."

\*6] \*ERLE, C. J.—I am of opinion that there should be no rule in this case. Enough has been stated to satisfy us that the learned Judge properly guided the jury to what we conceive to be the proper principle upon which their decision was to be based, and that their verdict had his approval. It appeared that the public had been allowed to go upon the bridge when turned for the passage of vessels along the canal: but it was the obvious duty of those going there to take ordinary care. I can see no negligence on the part of the Company in allowing people to stand on the bridge: and certainly no injury would have accrued therefrom to the deceased, if he had not, forgetting the position he was in, stepped back, and so fallen into the water. The doing so was want of ordinary care on the part of the deceased, for which the Company are not to be held responsible. Assuming that the Company were in some degree censurable, the negligence of the deceased was the cause, without which the accident would never have happened.

WILLIAMS, J.—I am of the same opinion. The jury found that the deceased had by his own negligence contributed to the accident. That being so, the Company are not liable because they permitted people to go on to the bridge. Being there, the deceased was bound to use due care to guard himself from danger. I see no reason to find fault with the way in which the case was left to the jury.

BYLES, J.—I am of the same opinion. The case now before us is very like those which qualified the decision of this Court in *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67). The Court in that case held that it was the duty of the owner of property adjoining a public highway so to fence it as to prevent danger to persons lawfully \*passing  
\*7] along the highway. On the other hand, the owner of land is under no liability to fence an excavation at a considerable distance from a public road: *Hounsell v. Smyth*, 7 C. B. N. S. 731 (E. C. L. R. vol. 97). When the bridge in question was swung back for the passage of a barge along the canal, it ceased to be a public highway: and a person going upon it was bound to use due diligence to avoid danger. I also think the verdict is right, upon the principle laid down by the Court of Queen's Bench in *Dowell v. The General Steam Navigation Company*, 5 Ellis & B. 195 (E. C. L. R. vol. 85). In the course of the argument there, it was urged by counsel that "the mere fact of negligence on the part of a plaintiff does not deprive him of the right to recover;" whereupon Lord Campbell interposed,—“Does it not, if it be the proxima causa or causa causans of the accident?” And, in giving judgment, his Lordship says: “According to the rule which prevails in the Court of Admiralty in a case of collision, if both vessels are in fault, the loss is equally divided: but, in a Court of common law, the plaintiff has no remedy if his negligence in any degree contributed to the accident.” There was a subsequent case in this Court

of *Tuff v. Warman*, 2 C. B. N. S. 740 (E. C. L. R. vol. 89). There, in an action for an injury to the plaintiff's vessel in consequence of a collision with a vessel under the control of the defendant,—there being conflicting evidence of negligence on the one side and on the other,—the jury were told, that, if the negligence or default of the plaintiff was in any degree the *direct* or *proximate* cause of the damage, he was not entitled to recover, however great might have been the negligence of the defendant; but that, if the negligence of the plaintiff was only *remotely* connected with the accident, then the question was whether the defendant might by the exercise of ordinary care have avoided it: and it was held that this was a proper direction. Williams, J., [\*8] there says: "With regard to the alleged misdirection, I must confess, after well considering the case of *Dowell v. The General Steam Navigation Company*, 5 Ellis & B. 195 (E. C. L. R. vol. 85), I am unable to distinguish the mode of directing the jury here from that which the Court of Queen's Bench sustained there. The law was there laid down, in conformity with several previous decisions, that, if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he cannot recover, however great may have been the negligence of the defendant; but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question is whether the defendant might not by the exercise of ordinary care have avoided it." The decision of this Court in *Tuff v. Warman* was affirmed by the Exchequer Chamber, on appeal,—5 C. B. N. S. 573 (E. C. L. R. vol. 94),—on which occasion, Wightman, J., in delivering the unanimous opinion of the Court of Error, says: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter, not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might by the exercise of care on his part have avoided the \*consequences of [\*9] the neglect or carelessness of the plaintiff. This appears to be the result deducible from the opinion of the Judges in *Butterfield v. Forrester*, 11 East 60, *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244,† *Davies v. Mann*, 10 M. & W. 546,† and *Dowell v. The General Steam Navigation Company*, 5 Ellis & B. 195, 206 (E. C. L. R. vol. 94)." Applying those principles to the facts of this case, it appears to me that the jury were well warranted in finding that the proximate cause of the misfortune sustained by the plaintiff was the culpable want of caution on the part of the deceased. And, the direction of the learned Judge having been framed in the very words in which directions in these cases are almost always given, I

feel bound to hold that the direction and the verdict were in accordance with the law and the facts.

KEATING, J., concurred.

Rule refused.

The general rule, reiterated in this case, that the party injured cannot maintain an action, if by his own negligence he has contributed to the injury, must, to employ the language of Denio, J., be considered "a legal postulate." One of latest American cases upon the point is *Wilds v. The Hudson River Railroad Company*, 10 Smith (New York Court of Appeals, 1862) 430, where the rule is laid down broadly and unequivocally. The right to recover damages depends upon the fact that the injury was attributable to the defendant exclusively; if it were occasioned in any degree by the negligence of the plaintiff, in other words if it would not have happened without plaintiff's contributing negligence, he cannot recover. See also *Button v. The Hudson River Railroad Company*, 4 Smith (New York Court of Appeals, 1858) 248, and cases cited; *Cox v. Westchester Turnpike Company*, 33 Barb. (N. Y. Sup. Court, 1861) 414; *Bieseigel v. The N. Y. Central Railroad Co.*, Id. 429; *Horton v. Ipswich*, 12 Cush. (Mass. 1853) 488; *Todd v.*

*The Old Colony, &c., Railroad Co.*, 7 Allen (Mass. 1863) 207. An extraordinary application of this principle is to be found in *The Philadelphia and Reading Railroad Co. v. Hummel*, 8 Wright (Pa. 1863) 375, where the mere presence of a child on a railroad track, not at a highway intersection, is of itself held to be such contributing negligence as to make it error for a court to submit the question to the jury.

This is also an illustration of the rule that the plaintiff must make out a *prima facie* case of exclusive negligence on the part of the defendant, before he is permitted to go to the jury: *Johnson v. The Hudson River Railroad Co.*; *Wilds v. The Hudson River Railroad Co.* It is not absolutely necessary, though it is frequently so stated, for the plaintiff to establish affirmatively his own freedom from negligence; it may result negatively from the character of defendant's delinquency: *Johnson v. The Hudson River Railroad Co.*; where the authorities are carefully reviewed.

\*10] \*JAMES OSBOND, Appellant; THOMAS MEADOWS, Respondent. May 5.

A., being upon his own land (or land upon which he was privileged to shoot), fired at and killed a pheasant in the land of B., and went upon B.'s land (without leave) and picked it up:—Held, a trespass "in search or pursuit of game," within the 1 & 2 W. 4, c. 32, s. 30,—the whole being one continuous act.

THE following case was stated for the opinion of this Court pursuant to the 20 & 21 Vict. c. 43:—

On the 4th of January, 1862, information was duly laid and deposited to on oath before one of Her Majesty's justices of the peace for the county of Northampton, that one Thomas Meadows did on the 3d of December, 1861, at the parish of Corby, in the county of Northampton, commit a certain trespass by being in the daytime of the same day upon a certain close of land in the possession and occupation

of Thomas Underhill there, in pursuit of game, without the license or consent of any person having any right to authorize the said Thomas Meadows to enter or be upon the said land for the purpose aforesaid, contrary to the statute.

The following is a copy of the information:—

“County of Northampton, } Be it remembered, that, within three months after the commission of the offence hereinafter mentioned, to wit, } to wit, on the 4th day of January, 1862, at Carlton, in the said county of Northampton, James Osbond, of Corby, game-keeper, in the said county, in his proper person, cometh before me, G. P., one of Her Majesty’s justices of the peace in and for the said county, and now here giveth me the said justice to understand and be informed that Thomas Meadows, farmer, of the parish of Corby, in the county of Northampton, did within three calendar months now last past, to wit, on the 3d of December, 1861, at the parish of Corby, in the said county, unlawfully commit a certain trespass by being in the daytime of the same day \*upon a certain close of land in the possession and occupation of Thomas Underhill, farmer, there, [\*11 in pursuit of game there, without the license or consent of the owner of the land so trespassed upon, or of any person having the right of killing game upon such land, or of any other person having any right to authorize the said Thomas Meadows to enter or be upon the said land for the purpose aforesaid, contrary to the statute in such case made and provided; whereby and by force of the said statute the said Thomas Meadows has forfeited a sum of money not exceeding 2*l.*, to be applied as the statutes in that case made and provided direct: And thereupon the same James Osbond prays that the said Thomas Meadows may be duly caused to appear before one or more of Her Majesty’s justices of the peace in and for the said county, to answer to the said information, and to be further dealt with according to law.”

“County of Northampton, } Be it remembered, that, after the exhibiting of the within-contained information, but before any proceeding had or taken upon such information either for summoning the said Thomas Meadows, the party accused, or compelling his appearance to answer the same, to wit, on the 4th day of January, 1862, at Carlton, in the said county, one Daniel Bell, game-keeper, of the parish of Corby, in the county of Northampton, a credible witness in this behalf, cometh in his proper person before me the within-named justice of the peace in and for the said county of Northampton, and is now here duly sworn by and before me the said justice; and, having heard the said information read, and fully understanding the same, does now here upon his oath aforesaid before me the said justice depose and swear that the charge contained in the said information is true and correct: And the said charge is now here \*deposed to and substantiated to my satisfaction before me the said justice on the said oath of the said Daniel Bell, so being [\*12 such credible witness as aforesaid, according to the form of the statute in such case made and provided.”

The charge was heard on the 8th of January, 1862, before three justices of the peace for the county of Northampton, at the petty sessions held at Kettering, at which both appellant and respondent appeared. It was proved at the hearing that the respondent, who had a

license to kill game, whilst in a close of land in the parish of Corby occupied by one George Chapman, over which he (the respondent) had the right of shooting, shot a pheasant, which was on the ground in an adjoining close, occupied by one Thomas Underhill, over which the Earl of Cardigan (to whom the appellant was game-keeper) had the exclusive right of shooting. It was proved that the pheasant was killed by the shot, and that the respondent afterwards went a short distance and got over the fence out of Chapman's close into the close occupied by Thomas Underhill, and there picked up the dead pheasant.

Having heard the evidence for the appellant, and the statement made by the respondent, who produced no evidence, the justices dismissed the case; the grounds of their determination being,—first, that, regard being had to the decision of the Court of Queen's Bench in the case of *The Queen v. Pratt*, 1 Dears. & P. C. C. 502, the act of shooting the pheasant by the respondent on the close of land in the occupation of Thomas Underhill, although actionable, did not constitute a trespass under the 30th section of the 1 & 2 W. 4, c. 32, the respondent not having been in that close when he shot, but in one occupied by George Chapman, where he was not a trespasser,—secondly, that \*13] the justices had some degree of doubt (to the \*benefit of which they considered the respondent entitled, the statute being a penal one), whether the subsequent entry on the close of land stated in the information, for the purpose of fetching the pheasant, which was then dead, as proved by the evidence, was such a trespass in pursuit of game as is contemplated by the 30th section of the above-mentioned Act; the doubt whether the provisions of that section apply to game when dead having been brought to their consideration by reference to a periodical called *The Justice of the Peace*, in which the case of *The King v. Halloway*, 1 C. & P. 128 (E. C. L. R. vol. 12), is quoted as an authority in favor of such doubt.

The question for the opinion of the Court was, whether the justices were right in point of law in dismissing the case upon the grounds above stated.

*E. Bennett*, for the appellant.—The respondent was clearly trespassing in pursuit of game, within the 30th section of the 1 & 2 W. 4, c. 32. That section recites, that "whereas, after the commencement of this act, game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist for protecting the same from trespassers," and then proceeds to enact, "that, if any person whatsoever shall commit any trespass by entering or being, in the daytime, upon any land in search or pursuit of game, or woodcocks, &c., such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction." To shoot at a bird on the land of another, the party firing being at the time on the highway (or on his own land or the land of a third person), though \*14] an actionable trespass, is not an offence within this \*statute: *The Queen v. Pratt*, 1 Dears. & P. C. C. 502. [ERLE, C. J.—The only question is, whether the appellant was guilty of a trespass in pursuit of game, by going on to the land to pick up the dead pheasant.

You can hardly hope to reverse the decision of the justices on the first point.] It is submitted that the shooting and the entering upon the land for the purpose of picking up the dead bird constituted one continuous act of trespass. It is assumed throughout the statute that dead game is "game." [ERLE, C. J.—The Larceny Act, 24 & 25 Vict. c. 96, s. 14, contemplates dead deer as "deer."] In *Morden*, app., Porter, resp., 7 C. B. N. S. 641 (E. C. L. R. vol. 97), it was held by Williams, J., that a party trespassing in pursuit of game is not the less guilty of the offence provided against by this statute, because he had no intention to commit a trespass, but *bonâ fide* believed that he had the license of the occupier for shooting over the land. A fortiori must the party be guilty of the offence, where, knowing the boundary, he wilfully passes over it to perfect an act of trespass already commenced by firing over the land. The case of *Loomes*, app., Bailey, resp., 30 Law J., M. C. 31, is also an authority, as far as it goes, that "game" means game whether alive or dead. Wightman, J., says: "The whole question turns on the meaning to be given to the words 'birds of game' in the 4th section. Now, the words must clearly have the same meaning throughout the section, and the exception in the latter clause, 'except birds of game in a mew or breeding-place,' beyond all question applies to *live* game, and, indeed, is only applicable to live birds. It is clear, therefore, that the phrase 'birds of game' was intended certainly to include live birds of game, and dead also, in all probability."

No one appeared on behalf of the respondent.

\*ERLE, C. J.—I desire to reserve for another occasion the consideration of the question whether the merely entering upon land [\*15 for the purpose of picking up dead game would constitute a trespass within the meaning of the 1 & 2 W. 4, c. 32, s. 30. But I am satisfied to give my judgment for the appellant, on the ground, that, in substance and reality, the shooting the bird and going upon the land to pick it up was one transaction. The respondent, being upon the land of an adjoining owner, fires at a bird and kills it, and he immediately steps upon the land to pick up the dead bird. The act of going on the land to pick up the bird relates to the act of shooting, and the whole was one transaction. I therefore think that the justices would have been well warranted in coming to the conclusion that the respondent had been guilty of the act of trespass charged against him. With the reservation before mentioned, I hold this without any hesitation. And the case must go back to the justices with this intimation.

WILLES, J.—I am entirely of the same opinion. The pursuit under s. 30 continues until it is consummated by the picking up of the dead bird.

BYLES, J.—If I were called upon to decide whether or not dead game was within the meaning of the clause in question, I should have desired time to consider. But I entirely agree with the rest of the Court in thinking that the pursuit commenced with the act of firing, and terminated with the act of picking up the dead bird. There was a pursuit of game, and there was a trespass. It would be highly inconvenient if we were to inquire in every case whether the bird had breathed its last or not at the time it was picked up. The appellant is clearly entitled to succeed.

\*16] **\*KEATING, J.**—I am of the same opinion. The respondent was clearly committing a trespass in search of game, the pursuit of which commenced upon his own land.

Judgment for the appellant.

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**FRANCIS BLEWETT, Appellant; ELIZABETH JENKINS and  
BLANCHE WILLIAMS, Respondents. April 28.**

A custom for copyhold tenants to fell timber or other trees upon their customary lands, and to retain the same for their own use, without license from the lord, although such timber may not be felled for necessary repairs, is not unreasonable.

And such a custom is not the less admissible in evidence, because it also professes to entitle the customary tenants to plough up meadow land and to suffer their houses to decay,—which might be a bad custom, if pleaded.

Where the customary tenants hold under a corn-rent or an annual sum of money in lieu thereof, in the absence of a custom to the contrary, the election is with the tenant to pay either in money or in corn.

Where, therefore, the assistant-commissioner, under the Copyhold Acts, upon evidence that for sixty years past the payments had invariably been made in money, decided that the election was with the tenant,—the court, upon a case stated by way of appeal, affirmed his decision.

THE following case was stated for the opinion of the Court by the copyhold Commissioners, under the provisions of the Copyhold Act, 1852 (15 & 16 Vict. c. 51), s. 8, and the Copyhold Act, 1841 (4 & 5 Vict. c. 35), s. 40.

The appellant is lord of the manor of Magna Porta, in the county of Monmouth, being tenant in tail in possession; and the respondents are tenants of copyholds of inheritance on the roll of the said manor.

In the course of valuations taken under the Copyhold Acts, with a view to the enfranchisement of certain lands and tenements held by the respondents as copyhold tenants as aforesaid of the said manor, the following questions (among others) arose, and were referred by the respondents to the said Commissioners.—“1. Whether the tenants of the manor of Magna Porta are entitled to fell timber and to retain the same to their own use without license of the lord, although such timber may not be felled for necessary repairs?

\*17] **\*“2. Whether the lord is entitled to seize for a heriot the best beast or chattel, unless found within the manor and belonging to the tenant at the time of his death or mortal sickness?**

“3. Whether the lord is entitled to corn-rents, unless stated in the copy of the court-roll of the tenants' admissions?

“4. Whether, if the lord is so entitled, are not such corn-rents a fixed money payment, variable with the price of corn, or otherwise?”

Mr. Wetherell, the Assistant Commissioner, in pursuance of this requisition, held an inquiry, and decided,—

“1. That the tenants of the manor of Magna Porta are entitled to fell timber and retain the same to their own use without the license of the lord, although such timber may not be felled for necessary repairs.

“2. That the lord is not entitled to seize for a heriot the best beast or chattel, unless found within the manor and belonging to the tenant at the time of his death or mortal sickness; but that the lord is en-

titled to seize for a heriot the best beast or chattel that is found within the manor and belonging to the tenant at the time of his death or mortal sickness.

"3. That the lord is entitled to corn-rents, though not stated in the copy of court-roll of the tenants' admissions.

"4. That such corn-rents are a fixed money payment, amounting to the annual sum of 4*l.* 2*s.* 2*d.*, and that the said rents are not variable with the price of corn."

1. In the course of the inquiry, a copy of an ancient survey of the manor, held in the year 1634, was put in by the respondents, and by consent \*admitted in evidence,—in which the following custom [\*18 is set forth:—"That, by the ancient custom of this manor of Magna Porta, time out of mind, every customary tenant or tenants may at all times at his or their pleasure fell or cut down timber or any other trees upon any of their several customary lands, and plough up the said grounds or meadows never tilled before, and also may suffer their houses to decay, or to pull down his or their houses, and to make any other benefit of his or their trees or woods so cut and taken out and from their or any of their respective customary lands, and the same also to take, sell, or convert to his or their private uses whatsoever, without any the prejudice or forfeiting of his or their estate or estates."

The actual practice within the manor has been in accordance with this presentment.

The appellant is dissatisfied with the decision of the Assistant Commissioner on the first question submitted to him, on the ground, that, although the practice may have been in accordance with the custom before stated, yet that such custom, taken altogether, is unreasonable and bad in law, and not binding upon the appellant: and, moreover, that the custom as set out on the presentment above referred to does not at all events extinguish the *prima facie* interest of the lord of the manor in the timber, but only protects the tenants from forfeiture for the waste; and that the Assistant Commissioner ought not, at all events, to have decided more than that the tenants of the manor are entitled to deal with the timber as stated in the presentment quoted above, without any prejudice or forfeiture of their estates, and not absolutely.

2. As to heriots,—in the copy of the survey before referred to, the following custom is set forth:—

"That the lord of this manor must and ought to \*have a [\*19 heriot of the best beast or chattel that a tenant dying shall be the owner of, depasturing upon his or her land at the time of his or her being sick, within the said manor, and not elsewhere; and, in default thereof, 5*s.* in lieu thereof, for and in the name of a heriot."

And it is also stated in another and distinct part of the said survey, "that the lord of this manor is and ought to have, after the death of any foreigner resident or stranger within this manor, for an heriot, the best beast or chattel that such stranger foreigner or resident shall be owner of at the time of his or their decease, or while being sick."

There is also another custom as to heriots stated in a distinct paragraph of the said survey. The actual practice in respect of the best beast or chattel of a tenant has been in accordance with the custom

above stated as to heriots. No evidence was offered as to the practice of the manor in respect of the right alleged by the survey to belong to the lord, to seize the best beast of strangers. But the appellant is dissatisfied with the decision of the Assistant Commissioner on this point, inasmuch as he (the appellant) alleges that the said customs as to heriots stated in the survey must be taken together; and that, as the lord cannot by law seize for a heriot, either within the manor or beyond the manor, the best beast or chattel of any foreigner resident or stranger dying within the manor, so the lord ought to be entitled to seize for a heriot the best beast or chattel belonging to any tenant on the rolls at the time of his death or mortal sickness, whether found within the manor or not; and that it is unreasonable that his right should be restricted, as decided by the Assistant Commissioner.

3. With regard to the corn-rents, no question arises on the decision \*20] upon the third question: but the \*appellant is dissatisfied with the decision of the Assistant Commissioner on the fourth point submitted to him. In the document dated in the year 1634, before mentioned, and called a survey, which on its face is stated to be, "The answer and presentment of the jury under named, and exhibited unto Higgins Powell and George Skiddamore, Gent., Commissioners, Surveyors, and Stewards, on the behalf of The Right Worshipful Edward Morgan, of Lantarnan, Esq., touching his survey of his manor or lordship of Magna Porta, in the county of Monmouth, to certain articles propounded and given unto us in charge to inquire of," there is the following presentment,—“Item. To the 2d article, we present and find that the customary tenants within this lordship of Magna Porta do hold their respective customary lands by the virge or rod, to them and their heirs for ever, according to the custom of this manor, by and under the yearly rent at their several names particularly appertaining, as followeth.” Then follows a schedule of lands and rents. The tenements as described in the schedule may (so far as the mode of render of rent is concerned) be divided into three classes, of which the following entries may be taken as instances:—

Annunciation rent.	“Imprimis. Lewis Richard, Gent., holdeth by the virge or rod, according to the custom of the manor, as tenant for lives by and under Giles Morgan, Esq., one tenement and divers parcels of customary lands, by and under the yearly rent payable to the lord of the said manor, the sum of sixteen shillings and eleven pence at the feast of the Annunciation and St. Michael the Archangel, by equal and even portions.	Michaelmas rent.
£ s. d.		£ s. d.
0 8 5½		0 8 5½
2.	“Item. Morgan Evan holdeth as aforesaid one tenement and divers parcels of customary lands by and under the yearly rent of 6s. 2d., payable as aforesaid, and nineteen hoops and three puddovams of corn mills oats, and six hoops and a half of wheat, for part of Jeyne Williams's lands or twenty shillings and 8½d, at every Michaelmas only.	Michaelmas rent.
Annunciation rent.		3s. 1d. for corn.
£ s. d.		
0 3 1		
3.	“Item. Alexander John holdeth by the virge or rod one tenement of customary lands, being part of Jeyne Gwilliams's lands, by and under the yearly rent of one hoop of wheat and three hoops and ½ of oats, or, in lieu thereof, 3s. 5d. at every Michaelmas only.”	Michaelmas rent.
Annunciation rent.		Rent of corn.
Michaelmas.		£ s. d.
		0 3 5

It is agreed that either party may on the hearing of the case refer to any other entry in the schedule; and that the copy of the survey

in the possession of the enclosure Commissioners shall, in the event of any dispute as to the language of the said schedule, be taken to be conclusive: and the tenements now in question cannot be identified with any of the tenements described in the said schedule.

For sixty years past, certain money payments have been made to the lord in lieu of corn-rents due in respect of the tenements held by the respondents.

The court-rolls in no case point out at whose option the payment by the tenant, whether in kind or by the money payment in lieu thereof, is to be made; nor does it appear by proofs in which party, the lord or the tenant, lies the right of election. The actual render has, for anything appearing to the contrary, always been in money.

Upon these facts, the Assistant Commissioner held that the entries in the court-rolls and survey were in *the nature of grants by the lord*; and that it was a rule of law applicable to the case, [\*22 that, in a grant where the right of election is not fixed by the grantor, such right vests in the grantee; and that the right of election in the present case was in the tenants, and that they had elected to pay a money rent.

The appellant is dissatisfied with this decision of the Assistant Commissioner, and contends, that, in point of law, it does not lie with the copyholder, but with the lord of the manor, to elect whether the tenant shall render the stipulated quantity of grain or make the money payment in lieu thereof.

The following question has also arisen:—

On the hearing of the case, and in the course of the inquiry before the Assistant Commissioner into the last question so submitted to him and decided, Mr. Gwatkin, the solicitor of the appellant, the lord of the manor, tendered in evidence on his behalf certain title-deeds of the manor, viz. a deed to make a tenant to the præcipe, dated the 23d of November, 1786, and a deed of mortgage dated the 29th of February, 1856, in which it is recited that the corn-rents are commutable at the will of the lord: but the Assistant Commissioner rejected this evidence, as being inadmissible against the respondents.

The respondents contend that this point is not now open to the appellant, inasmuch as the Assistant Commissioner, being by the Copyhold Act, 1852, sole judge of fact, his decision on admissibility of evidence is final and conclusive; and, secondly, that no request was made by the appellant within twenty-eight days after the evidence tendered was rejected to the commissioners to direct a case to be stated as to whether in point of law the evidence ought to have been admitted or rejected.<sup>(a)</sup> The only request to the commissioners *to* [\*23 direct a case to be stated on any point was made by Mr. Gwatkin, the solicitor to the appellant, on the 4th of April of 1860. This was more than twenty-eight days after the rejection of evidence before mentioned, but less than twenty-eight days after the decision of the Assistant Commissioner upon the points submitted to him as above set forth. The request was in writing, and in the following words,—“On behalf of the said Edward Francis Blewett, I request you to direct a case to be stated for the opinion of such one of Her Majesty’s courts of law at Westminster as you shall think fit, upon the follow-

(a) See 4 & 5 Vict. c. 35, s. 40, and 15 and 16 Vict. c. 51, s. 8.

ing question of law, viz.: 1. Whether the customs recorded in a certain survey of 1634, put in evidence by the enfranchising copyholders, as to timber and heriots, though they may be considered immemorial and certain, are also on the whole reasonable, and whether they are on the whole good and valid customs to exclude the lord of the manor from all interest in the timber on the copyhold lands, and to disentitle him, on the death of a copyhold tenant, to seize for heriots otherwise than within the manor. 2. Whether, in point of law, it lies with the copyholder, and not with the lord of the manor, to elect whether to render the stipulated quantity of grain as corn-rent, or to make a customary money payment in lieu thereof."

The questions for the opinion of the Court were,—1. Whether, upon the whole custom as stated in the case, with reference to waste, such custom is good and valid in law so as to entitle the tenant to cut and sell for his own use all the timber growing on the tenement. 2. Whether, looking to all the facts stated in the case as to the custom with reference to heriots, such custom is good and valid in law, so as to restrict the right of the lord to a heriot of the best beast or chattel of the \*24] tenant at the time of his death or mortal \*sickness found within the manor. 3. Whether the Assistant Commissioner is right in point of law in his decision as to the right of election being in the copyholder, and not in the lord of the manor. 4. Whether it is now open to the appellant to ask the opinion of the Court upon the question of the rejection of evidence by the Assistant Commissioner, as stated in the case. And, lastly (if the Court should be of opinion that it is now open to the appellant so to do), then whether such evidence was properly rejected or not.

*Bullar*, for the appellant.(a)—The only questions which it is proposed to argue are the first and the third: the others are plainly not arguable. 1. The custom to cut timber at the will of the tenant is clearly unreasonable and void. The terms in which it is set out in the survey are as follows:—"That, by the ancient custom of this manor of Magna Porta, time out of mind, every customary tenant or tenants may at all times at his or their pleasure fell or cut down timber or any other trees upon any of their several customary lands, and plough up the said grounds or meadows never tilled before, and also \*25] may suffer their houses to \*decay, or to pull down his or their houses, and to make any other benefit of his or their trees or woods so cut and taken out and from their or any of their respective customary lands, and the same also to take, sell, or convert to his or their private uses whatsoever, without any the prejudice or forfeiting of his or their estate or estates." This must be taken as one custom; and it amounts to this, that the copyholders may commit any sort of

(a) The points marked for argument on the part of the appellant were as follows:—

"1. That the alleged custom of felling timber without licence, and wasting and destroying houses, is unreasonable and void:

"2. That the appellant, as lord of the manor, is entitled to a heriot from the respondents, as tenants, whether the beast or chattel be in or out of the manor at the time of their deaths or mortal sickness:

"3. That the right to elect whether the corn-rents shall be paid in money or corn lies with the appellant, as lord, and not with the respondents, as tenants:

"4. That the Assistant Commissioners should have received in evidence the deeds rejected by him, and that the appeal on this point, is in proper time."

waste on their customary tenements, and may in fact destroy them altogether. A copyholder clearly can have no right as against the lord which will effect the total destruction of the lord's interest or his means of enforcing the customary rents and payments. If any part of a custom be unreasonable the whole is void: *Wilkes v. Broadbent*, 2 Stra. 1224, 1 Wils. 63. In *Wilson v. Willes*, 7 East 121, a custom, that all the customary tenants of a manor having gardens, parcels of their customary tenements respectively, have immemorially, by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their said customary tenements; for the purpose of making and repairing grass-plots in the gardens parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle as hath been fit and proper to be so used, at all times of the year, as often and in such quantity as occasion hath required,—was held to be bad in law, as being indefinite and uncertain, and destructive of the common: and so of a similar custom of taking and applying such turf for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences of such customary tenements. [WILLES, J.—Is this anything more than a claim by the customary tenants to be dispunishable of waste?] It goes far beyond that. *Clayton v. Corby*, 5 Q. B. 415 (E. C. L. R. vol. 48), 2 Gale & D. 174, and \*other [\*26 cases, show that a claim by custom to do that which amounts to a total destruction or spoliation of the tenement to which the custom has reference, is unreasonable and bad. The case of *The Marquis of Salisbury v. Gladstone*, 6 Hurlst. & N. 123,† carries the rights of copyholders in this respect further than has yet been done. It was there held that a custom in a manor, that the copyholders of inheritance may, without license from the lord of the manor, break the surface and dig and get clay without limit in, upon, and out of their copyhold tenements, for the purpose of making bricks, to be sold by them off the said manor, was good in law. It did not appear in that case that the doing of that which the tenant claimed to do would effect the destruction of the whole surface, which the claim here amounts to. Wightman, J., in delivering the judgment of the Court in that case, says: "In Scriven on Copyholds, p. 427, 4th edit., it is said that by custom a copyholder of inheritance may be entitled to the trees and mines in his copyhold. Mr. Manisty, in his argument, did not doubt but that a custom for a copyholder to have and work quarries and mines might be good, but contended that the surface must be left: but no case was cited to warrant such a conclusion. It may be that the mine or mineral, or a quarry of stone, might occupy the whole surface of the particular copyhold tenement, and that a general right to take stone or minerals would necessarily involve the taking of the surface: but, in the present case, there is nothing to show that the taking the clay would necessarily involve the taking of the surface,—all the clay might be so situate as to be capable of being got at as coals or other minerals." That case, therefore, differs widely from the present. No authority is to be found in the books to warrant such a custom as is here attempted to be set up.

\*The next question is, whether the lord of the manor has the option to take the rent in corn, or is bound to content himself [\*27

with money payments. It appears that there is no custom which expressly regulates this: but money rents have generally been paid. The Assistant Commissioner decided that the option is with the tenant, and that the corn-rents are a fixed money payment, not variable with the price of corn. [WILLES, J.—The general rule is, that the election is with the party who is to do with the first act.] Subject always to this proviso, that the election is made at the time. If the tenant chooses to pay at the day, he has the option; if not, the lord has it. So held in Rolle's Abridgment, *Election* (B), "*Qui ceo avera.*" "*Si home leas terre per ans reservant weekly 9 quarters de wheat ou le value de ceo as it shall be then sold in the market of W.; si le lessee pay null de eux al temps appoint, le lessor poet aver son action a son election pur le wheat solment ou pur le value solment; car coment que le lessee puisse avoir paie aucun de eux a son election al jour, uncore ore apres le jour la ley done l'election al lessor.*" Tr. 8 Ja., Br. enter Seigneur Denny and Parnell, adjudge." To the same effect is Co. Litt. 90, b,—"*A tenant holdeth of his lord certaine lands in soccage, to pay yearly a paire of gilt spurs or five shillings in money at the feast of Easter. In this case the rente is uncertaine, and the tenant may pay which of them he will at the said feast, and likewise the tenant may pay which of them he will for reliefe: but, if he pay it not when he ought, then may the lord distraine for which of them he will.*" [WILLES, J.—The part which principally treats of election is fo. 145 a, where Lord Coke notes six diversities, the fourth of which is as follows,—"*Fourthly, in case an election be given of two several things, alwaies he which is the first agent, and which ought to* \*28] *do the first act, shall have the election. As, if a man granteth a rent of twentie shillings or a robe to one and to his heires, the grantee shall have the election; for, he is the first agent, by payment of the one, or deliverie of the other. So, if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election, causâ qua suprâ. And with this agree the bookes in the margent.*(a) But, if I give unto you one of my horses in my stable, there you shall have the election; for, you shall be the first agent, by taking or seizure of one of them. And, if one grant to another twentie loads of hazell, or twenty loads of maple, to be taken in his wood of D., there the grantee shall have election; for, he ought to do the first act, scil. to fell and take the same." The passage you cite seems hardly to be reconcilable with that. KEATING, J.—How are we to say that the Assistant Commissioner came to a wrong conclusion? ERLE, C. J.—The tenant clearly has the election: *perhaps* he may in a certain event lose it.]

*G. Denman, Q. C.,* contrâ, was stopped by the Court.(b)

(a) 9 E. 4, fo. 36 b, 13 E. 4, fo. 4, b, 5 E. 4, fo. 6 b, 11 E. 3, an. 27, 11 Ass. p. 8, 29 Ass. 55, 3 E. 3, tit. Ass. 175, 43 E. 3, tit. Barre, 194.

(b) The points marked for argument on the part of the respondents were as follows:—

"1. That the presentment firstly stated in the case is not of one whole custom consisting of several parts, but of several independent customs relating to distinct subject matters: and that a custom for a tenant to cut and sell for his own use timber growing on the tenement is reasonable:

"2. That, if the presentment must be considered as of one whole custom, then it is reasonable as a whole:

"3. That a custom bad in part is void only where the part which is bad is essential to the exercise of the custom as a whole, and cannot be rejected:

\*ERLE, C. J.—With regard to the finding of the Assistant Commissioner “that the tenants of the manor of Magna Porta are entitled to fell timber and retain the same to their own use, without the license of the \*lord, although such timber may not be felled for necessary repairs,” it appears to me that the case of *The Marquis of Salisbury v. Gladstone*, 6 Hurlst. & N. 123,† is a clear authority binding us to hold that the custom is not an unreasonable one. It was there held that a custom that the copyholders of inheritance in a manor may, without license from the lord, break the surface and dig and get clay without limit in, upon, and from and out of their copyhold tenements, for the purpose of making bricks, to be sold by them off the manor, was good in law. The only matter here found by the Assistant Commissioner is, the right of the tenants to fell timber and retain the same to their own use. But it is contended on the part of the lord that the custom given in evidence before the Assistant Commissioner went a great deal further, viz. to enable the tenants to “plough up grounds or meadows never tilled before,” and also to “suffer their houses to decay, or to pull down his or their houses,” that such a custom would clearly be unreasonable, and that, being bad in part, the custom set up is bad altogether. That may be so where the custom is pleaded: but, where it is merely given in evidence, I do not see why that part which is good should not be received, because there may be other part which is unreasonable. I am not, however, aware that there is anything illegal in a copyholder of inheritance allowing the tenement to go to decay, though possibly he might thereby deprive the lord of the power to distrain.

As to the corn-rents,—it appears that many of the tenants of this manor held their customary tenements subject to the payment of cer-

“4. That a presentment of a custom is not conclusive evidence of such a custom as a whole, but it will be presumed in favour of a good custom that the presentment of a bad part, if separable, was so far erroneous :

“5. That a custom to cut and sell timber growing in the customary tenement involves a proprietary right in the tenant capable of passing the property to a purchaser, and therefore inconsistent with a property remaining in the lord :

“6. That the selling timber, apart from the cutting it, is no ground of forfeiture, and that the presentment must be read *reddendo singula singulis* ; and that the words ‘ without any the prejudice, &c., ’ have no reference to those immediately preceding them, but that the custom to sell is absolute :

“ *As to heriots,*

“7. That a custom which restricts the lord to the taking of heriots within the manor, is a good custom :

“8. That, if a custom bad in part be wholly void, the custom presented is so, inasmuch as a heriot cannot be taken of a stranger :

“ *As to the rent,*

“9. That, where one mode of payment has been for a long period adopted, it will be presumed, in the absence of other evidence, that the election has been made to pay in that manner :

“10. That, in the absence of express custom for the lord to elect, the tenant has the right of election :

“11. That the decision of the Assistant Commissioner upon the admissibility of evidence is final :

“12. That no specific request was made to the Assistant Commissioner to state a case upon the rejection of the evidence in question :

“13. That the request to direct a case to be stated was not made to the Assistant Commissioner within twenty-eight days after his decision that the evidence was inadmissible :

“14. That, the respondents not being parties or privies to the deeds sought to be put in evidence, nor in *pari jure* with those who were, recitals in those deeds were inadmissible against them.”

tain money rents or the render of certain measures of corn : and, upon the facts before him, the Assistant Commissioner held that the entries in the court-rolls and survey were in the nature of grants by the lord; \*31] and that it was a rule of \*law applicable to the case, that, in a grant, where the right of election is not fixed by the grantor, such right vests in the grantee; and that the right of election in the present case was in the tenants, and that they had elected to pay a money rent. I am of opinion that the Assistant Commissioner was quite right in holding that the election is with the copyholder, though it may be that, if he made default in payment on the day, the lord might bring his action for either, at his option. We need not, however, deal with that on the present occasion; for, it appears that for sixty years last past the rents have always been paid in money; and there is no evidence upon the court-rolls of any other kind of payment, or to show that the election ever was with the lord. All that we affirm by our decision, is, that the adjudication of the Assistant Commissioner that the election is with the tenant, is right. I therefore think our judgment must be for the respondents, and with costs.

WILLES, J.—I am entirely of the same opinion. The case of *The Marquis of Salisbury v. Gladstone*, 6 Hurlst. & N. 123,† disposes of the first point. And, as to the other, the authority of Lord Coke,—Co. Litt. 145 a,—is distinct. Here, the tenant has the election. Whether or not he may lose that right by his failure to pay the rent at the day, is a question which does not arise here. It is enough to say that the conclusion the Assistant Commissioner came to is correct.

The rest of the Court concurring,

Judgment for the respondents, with costs.

\*32] \**NEWTON and Others v. CUBITT and Others. May 2.*

A ferry is the exclusive right to carry passengers across a river or arm of the sea from one vill to another, or to connect a continuous line of road leading from one township or vill to another, and not a servitude imposed upon a district or large area of land; and is wholly unconnected with the ownership or occupation of land.

In an action for an infringement of the plaintiffs' ancient ferry, the declaration contained a count for carrying in the line of the plaintiffs' ferry, and a count for carrying near thereto for the purpose of evading it. No grant was forthcoming; but, in an ancient deed (1676), conveying the ferry to those under whom the plaintiffs claimed, it was described as "all that ferry and ferry place commonly called or known by the name of Potter's Ferry, with the ferryage, &c., for men, horses, &c., over the river Thames, lying, being, and extending itself from a place or marsh called the Isle of Dogs, over the said river Thames into the town of Greenwich, in the county of Kent." The evidence of user went to establish a right of ferry in the plaintiffs and those under whom they claimed, from a point in the Isle of Dogs called Potter's Ferry Stairs to Greenwich; and it appeared, that, down to the year 1812, there was but one public road across the island, viz. from Poplar to Potter's Ferry, but that, since that time, a great number of houses and factories had been built upon the island. The defendants erected a pier on their own land, and on the shore adjacent, about 1280 yards from Potter's Ferry Stairs, and by means of a steamboat carried passengers therefrom to Greenwich and other places on the opposite side of the river: and this the jury found to have been done with the bonâ fide object and intention of affording necessary accommodation to the inhabitants of the new district (who were about 3000 in number), and not with any intention of diverting passengers from the plaintiffs' ferry, or in any way interfering with the rights of its owners. There was no public road leading from this new district to Potter's Ferry Stairs.

Upon a special case setting forth these facts,—Held, that the evidence therein disclosed only

established a right of ferry from Potter's Ferry Stairs to Greenwich, and not from the whole of the Isle of Dogs (as claimed), and did not show an actionable disturbance of the plaintiffs' ferry, notwithstanding the defendants might occasionally have carried a person who came from Poplar.

THIS was an action for an alleged infringement by the defendants of the plaintiffs' right of ferry.

The first count of the declaration alleged that the plaintiffs were lawfully possessed of an ancient ferry, called Potter's Ferry, for foot-passengers and goods belonging to such foot-passengers, across the river Thames from a certain place called the Isle of Dogs, in the parish of St. Dunstan, Stebonheath, otherwise Stepney, in the county of Middlesex, to Greenwich, in the county of Kent, taking for the carriage and conveyance of such passengers and their goods in boats of the plaintiffs kept for that purpose certain reasonable freights and ferryages; and that the defendants, well knowing the premises, wrongfully carried and conveyed divers foot-passengers and goods belonging to such passengers for hire in a certain boat over and across the said river Thames, and upon the said part of the said river where the plaintiffs had such ferry as aforesaid, and *over and upon and within the said ferry of the plaintiffs*, to wit, from the Isle of Dogs aforesaid \*to Greenwich aforesaid; whereby the plaintiffs had lost divers [\*33 profits which otherwise would have arisen to them from the enjoyment of their said ferry, and had been and were disturbed in the possession and profits thereof.

The second count was similar to the first, save that it alleged that the defendants wrongfully, unlawfully, and for the purpose of evading the ancient ferry of the plaintiffs, and against the will of the plaintiffs, carried and conveyed in a certain boat of the defendants divers foot-passengers for hire over and across the said river Thames, *near to the said part of the said river where the plaintiffs had such ferry as aforesaid, and near to the said ferry of the plaintiffs*.

The defendants pleaded,—first, not guilty,—secondly, to the first count, that the plaintiffs were not possessed of the ferry in that count mentioned as alleged,—thirdly, a similar plea to the second count; upon each of which pleas issue was joined.

The cause came on for trial before Cockburn, C. J., and a special jury, at the sittings at Westminster after Hilary Term, 1859, when a verdict was by consent entered for the plaintiffs, subject to the opinion of the Court upon the following case:—

The plaintiffs are the lessees of an ancient ferry known as Potter's Ferry or Isle of Dogs Ferry, from the Isle of Dogs, in the county of Middlesex, to Greenwich, in the county of Kent.

By an indenture dated the 7th of June, 1676, and made between Lady Wentworth and others, of the one part, and John Warner, John Reeley, and Thomas Jones, of the other part, it was witnessed, that, for the considerations therein mentioned, the said Lady Wentworth and others, at the nomination of the said John Warner, did grant, empoll, release, and confirm unto the said John Reeley and Thomas Jones all that their \*ferry and ferry place commonly called or [\*34 known by the name of Potter's Ferry, with the ferryage, way-tage, and passage for men, horses, beasts, and all other cattle and carriages whatsoever, over the river Thames, lying, being, and extend-

ing itself from a place or marsh called the Isle of Dogs, or Stebon-heath Marsh, within the said manor, over the said river Thames into the town of Greenwich, in the county of Kent, and free liberty of carrying, ferrying, and transporting men, horses, beasts, and all other cattle and carriages whatsoever, to and from the said marsh into and from the said town of Greenwich, with wherries, flat-bottom ferry-boats, or otherwise howsoever, together with all profits and advantages of ferryage, wharfage, and passage, and all other commodities, emoluments, and appurtenances to the said ferry belonging or in any wise appertaining, or reputed or taken as part, parcel, or member thereof, in as full, large, and ample a manner as the same hath been at any time heretofore demised, granted, letten, used, occupied, or enjoyed, To hold the same unto and to the use of the said John Reeley and Thomas Jones, their heirs and assigns for ever.

By several subsequent conveyances to the same effect the fee simple and inheritance of the said ferry from the said Isle of Dogs over the said river Thames into the said town of Greenwich, has come to and is now vested in the trustees for the time being of a friendly society of free watermen, called the Isle of Dogs Ferry Society, and the plaintiffs at the commencement of this action were the lessees of the said ferry, and held the same as such lessees by virtue of an indenture dated the 11th of June, 1858.

The owners of the said ferry have an ancient embarking place or stairs at the Isle of Dogs, called the Potter's Ferry Stairs; and the \*35] said stairs before and \*at the time of the grievances complained of in the declaration were the sole stairs for the embarking of persons using the said ferry from the Isle of Dogs to Greenwich.

The right of ferry is limited to the conveying of passengers from the Isle of Dogs to Greenwich. There is no corresponding right of ferry from Greenwich to the Isle of Dogs.

The Isle of Dogs is situate on the banks of the Thames, and the south side thereof is opposite to Greenwich. The island is, except on its northern side, surrounded by the river Thames, and is about one square mile in extent. Up to a recent period, the whole of the island was marsh, intersected by dykes, and used only for the feeding of cattle. In many parts it was covered with reeds, and in some seasons was in parts under water. It was uninhabited, except by the persons working the ferry and by a man whose duty it was to take the cattle off the marshes. Till the year 1812, there was only one road or way in the island, namely, a road or way leading from Potter's Ferry Stairs, in a northerly direction, through the centre of the island, to the village of Poplar, where it ran into a street called the High Street. The distance from Poplar to the stairs by this road was about one mile and three-quarters. The way was a public way, and was known by the name of the Manor Way. The part of the island which abutted on the Thames was surrounded by a bank or wall of earth to protect it from inundations. The said bank or wall of earth was tortuous in its course, following the indentations of the river, and was a portion of the general embankment or river-wall running along that side of the river,—traces of which, extending beyond the Isle of Dogs, and as far as Southend, which lies at the mouth of the river Thames, exist to this day.

\*The said wall was watched by people whose duty it was to see that it was in a fit state to keep out the high tides; and [\*36 earth was added to the top from time to time as occasion required, for that purpose. In fine weather, the top of the wall was used as a road by persons preferring to go round by the water. It had become a worn road, though not kept in repair.

When the West India Docks were made, in or about the year 1800, they were made in the Isle of Dogs, and right across the way or road which led to and from Poplar and the Potter's Ferry Stairs; in consequence of which it became necessary that the road should be diverted, which was done, and the road was carried to the distance of half a mile in an easterly direction over the bridges built at the entrances of the West India Docks, and so into Poplar.

Adjoining Poplar, on the east side, is Blackwall, all the neighbourhood of which is comparatively modern. Here a pier has been erected, called the Brunswick Pier, and from this about sixteen years ago steamboats began to run to and from a point in Greenwich close to the ferry landing-place; and such steamboats have continued to run there ever since. From High Street, Poplar, to the Brunswick Pier at Blackwall, the distance is half a mile. From High Street, Poplar, to Cubitt's Pier (hereafter mentioned), the distance is one mile and a half. From the bridge at the entrance of the docks to Potter's Ferry Stairs, the distance is one mile and 920 feet, by the diverted road. Steamboats run every quarter of an hour from Brunswick Pier to Greenwich Pier.

In the year 1812, an Act of Parliament was obtained, under the provisions of which the before-mentioned Manor Road was improved and altered into a carriage-road, after which it was called the Ferry Road.

Within the last thirty years the Isle of Dogs has \*been much built upon, both on the east and west sides of the said road: but, [\*37 until the year 1846, when the defendant Cubitt began to build as hereinafter mentioned, there was no building on the island on the east side of the said road, except a public-house called the Folly House, which was situated on the banks of the river, and was distant rather more than a mile from the ferry stairs.

Within the last few years, factories and workshops and houses have been built on the island; and it now contains many inhabitants.

In the year 1842, the defendant Cubitt became possessed of a large tract of land on the east side of the said island, and east of the said Ferry Road, and abutting on the River Thames. He made an embankment along the whole of the river frontage of this land, filling up the indentations of the old river-wall, which was thereby rendered unnecessary, and was in fact obliterated. He drained the whole of the land, and began to build on it where it was previously a marsh and uninhabited, and has built there many houses, factories, and a church; and the buildings are still regularly progressing. This part of the island at the time of the alleged grievances contained about 3000 inhabitants, and was called or known as Cubitt Town.

The defendant Cubitt also constructed a dock and wharf and landing-place called Cubitt's Corner. He also made roads over the part of the island built upon by him, and, in the year 1857, erected a pier

extending 138 feet into the river, for the use of the inhabitants of Cubitt Town. This pier is distant three-fourths of a mile along the shore of the river from the Potter's Ferry Stairs, and about one mile and a quarter from Garden Stairs, Greenwich. The distance by the road between the pier and the Potter's Ferry Stairs is 1282 yards.

\*38] The pier and steamboat are an accommodation \*to persons desirous of proceeding from Cubitt Town to Greenwich, as it is more convenient to cross direct by the steamboat than it is to proceed across the island, and then across the river by the ferry-boat.

This being the altered state of things on the eastern shore of the island, the defendant Cubitt, in the month of June, 1858, hired a steamboat, and caused it to ply from the said pier to the Greenwich pier, which adjoins Garden Stairs. It was found by the jury at the trial, and must be taken as a fact, that he did this with the bonâ fide object and intention of affording necessary accommodation to the inhabitants of Cubitt Town, and not with any object or intention of diverting passengers from the said ferry, or in any way injuring the rights of its owners, though it might to a small extent have that effect.

The defendant Vorley was the master of the said steamboat, which plied between Cubitt's Pier and Greenwich from the time it was so laid on to the commencement of the action. It was to try the right of the defendants to convey passengers by this steamboat that the present action was brought.

The Ferry Company have at all times claimed the exclusive right to convey passengers from all parts of the Isle of Dogs to the opposite shore. But it appeared, that, on the western side, there are two landing-places, called The King's Arms Stairs and the Cocoa Nut Stairs, the former distant about a mile, the latter about half a mile from the Potter's Ferry Stairs; and from these stairs on the western side watermen not members of the Ferry Company, nor using boats belonging to the Company, have in very numerous instances embarked and conveyed passengers for Greenwich without obstruction or interference on the part of the Company. There was, however, no positive evidence that this was known to the Ferry Company, further \*than

\*39] the same might be inferred from the frequency of the practice.

The right of the Company as regards the southern side of the island is not now in dispute. It was established in the actions of *Giles v. Groves*, 12 Q. B. 721 (E. C. L. R. vol. 64), *Blacketer v. Gillett*, 9 C. B. 26 (E. C. L. R. vol. 67), and *Doust v. Matthews*, hereinafter referred to. The present contest has reference to the eastern side of the island, as to which the owners or lessees of the ferry claim the sole and exclusive right of ferrying all persons passing from any point of the shore to the opposite shore from Deptford Creek to Charlton,—a distance of three miles.

It appeared in evidence on the trial, that, on many occasions, the lessees of the ferry, on seeing watermen or others not authorized by the ferry society conveying passengers from this part of the Isle of Dogs to Greenwich, have interfered, and either prevented such unauthorized persons carrying such passengers, or have caused them to pay over the passage-money received by them from such passengers. It is contrary to a by-law of the Waterman's Company, made

under the powers conferred upon them by the 7 & 8 G. 4, c. lxxv., for a waterman to take passengers from an unlicensed place; and he is liable to a penalty for so doing. On the other hand, it appeared that watermen not authorized by the society were often in the habit of conveying passengers from the Isle of Dogs, especially from the Folly House, a public-house on the shore, to Greenwich; but it does not appear that this was done with the knowledge of the society or their lessees.

The right of the society was enforced by proceedings at law in the following instances:—In the year 1817, the existence of the ferry was brought in question in an action of *Giles v. Groves*, in the Queen's Bench (12 Q. B. 721 (E. C. L. R. vol. 64)), in which action it was found by the jury, and adjudged by the Court, that a ferry-right from the \*Isle of Dogs to Greenwich did exist, and that the fee simple [\*40 thereof was vested in the trustees of the said Isle of Dogs Ferry Society. Afterwards, in the year 1849, one Gillett, denying the right of ferry in the Company to ferry passengers from the Isle of Dogs to Greenwich otherwise than from Potter's Ferry Stairs, plied for passengers from a certain place in the Isle of Dogs called Johnson's Corner, situate on the south side of the island, and about two hundred yards below the said Potter's Ferry, and conveyed passengers from the said Johnson's Corner to Greenwich; whereupon the Isle of Dogs Ferry Society, by one Blacketer, their then lessee, brought an action against Gillett, which was tried in the Court of Common Pleas at Westminster in the year 1849, when it was found by the jury, and adjudged by the Court, that the said Gillett had disturbed the lessee of the said ferry society in the enjoyment of the said ferry: see *Blacketer v. Gillett*, 9 C. B. 26 (E. C. L. R. vol. 67).

The defendant Cubitt having constructed the dock and wharf as before stated, and also the landing-place called Cubitt's Corner, situate 630 yards below the Potter's Ferry landing-place, caused a finger-post to be erected on the Isle of Dogs, pointing towards the place called Cubitt's Corner, on which was painted "This way to Greenwich;" and one Matthews commenced plying with a boat for the conveyance from Cubitt's Corner to Greenwich of passengers in general. Whereupon the Isle of Dogs Ferry Society, by one Doust, their then lessee, brought an action against the said Matthews for disturbance of the said ferry belonging to the said society, which action was tried in the Court of Common Pleas in the year 1856, when by the said Court it was also adjudged that the said Matthews had infringed the right of ferry belonging to the said society.

Upon the trial of the present action, it appeared, \*that, in the [\*41 year before the defendants' steamboat commenced running, the owners of the Isle of Dogs Ferry let the same for the sum of 470*l.* per annum; whereas, since the boat commenced running, the ferry has produced less than half that amount. It was also proved that the defendants had conveyed not only the occupiers of the new houses at Cubitt Town, but also other persons coming from other places, and who would otherwise have crossed from the plaintiffs' ferry-stairs to Greenwich, and who therefore had been diverted by the said pier and steamboat: but it also appeared, that, with one or two exceptions, the persons were not persons coming from Poplar, but persons living at

East and West Greenwich and Woolwich, and working at the East and West India Docks, and who used the steamboat in going to and from their work.

The only person who used the steamboat in coming from Poplar to Greenwich was a man resident at Greenwich, who worked at Poplar, and who sometimes went by the steamboat from Cubitt's Pier and sometimes by the ferry-boat from Potter's Ferry landing-place, but who when pressed for time went by the ferry-boat. Another witness for the plaintiffs proved, that, when working in the East India Docks, which are in Blackwall, he used to go to and from Greenwich, where he resided, by the steamboat from Cubitt's Pier; but, when working at Mill Wall, which is in Poplar, he used to go to and from Greenwich by Potter's Ferry.

Upon this state of facts, it was contended for the defendants,—first, that the right of ferry of the plaintiffs did not extend to the eastern side of the island,—secondly, that the steamboat having run *bonâ fide* for the accommodation of the inhabitants of Cubitt Town, the conveyance thereby of passengers from the pier there was not a disturbance of the right of ferry of the plaintiffs.

\*42] \*On the other hand, it was contended for the plaintiffs, that they were entitled to the right of ferry in respect of all persons passing from the said Isle of Dogs to Greenwich, as well as of those persons who had been accustomed to pass over the plaintiffs' ferry before the new houses and buildings were erected; and that the running of the said boat, and the conveyance of the passengers therein by the defendants as aforesaid, was a disturbance of the plaintiffs' right of ferry, for which the plaintiffs were entitled to maintain the action.

The Lord Chief Justice left it to the jury to say,—first, whether it had been the intention of the defendants, by establishing the said steamboat and conveying the said steam-passengers, merely to accommodate the occupiers of the said new houses and buildings, or also to interfere with the traffic by the ferry of the plaintiffs,—and, secondly, whether, besides conveying the occupiers of such new buildings and houses, it had had that effect.

The jury found that it was not the intention of the defendants, in running the said steamboat, to divert the traffic from the plaintiffs' ferry by establishing the steamboat and conveying passengers as aforesaid, but merely to accommodate the occupiers of the said new houses and buildings; but that, besides the conveyance of the occupiers of the said new houses and buildings, it had to a small extent had that effect.

A verdict was thereupon entered for the plaintiffs, subject to the opinion of the Court.

The questions for the opinion of the Court were,—first, whether, upon the facts stated, the conveyance of passengers from Cubitt Town amounted to a disturbance of the plaintiffs' right of ferry,—secondly, whether the conveyance of other passengers than those coming from Cubitt Town amounted to a disturbance of the plaintiffs' right.

\*43] \*If either of these questions should be answered in the affirmative, the verdict was to stand, with such damages as should be found to have been sustained by the plaintiffs on the certificate of an arbitrator to be agreed upon by the counsel on both sides. If not the verdict was to be set aside, and a verdict entered for the defendants.

The Court were to be at liberty to draw any inferences of fact not inconsistent with the finding of the jury.

*Pigott*, Serjt. (with whom was *Powell*), for the plaintiffs.—The only difference between the present case and the cases of *Giles v. Groves*, *Blacketer v. Gillett*, and *Doust v. Matthews*, is, that here the passage is effected from a different point. But it is submitted that the plaintiffs are entitled to the judgment of the Court for the interference with their right of ferry, whether from Cubitt Town, or from any other part of the Isle of Dogs,—the improvements which have been effected in the neighbourhood cannot afford any excuse for an encroachment on their franchise. This Court distinctly held in *Blacketer v. Gillett* that a count alleging that the plaintiffs were entitled to a ferry, and that the defendant conveyed passengers and goods across the river near to the plaintiffs' ferry, and that by reason thereof the plaintiffs lost profits and were disturbed in the possession of their ferry, disclosed a good cause of action. It is seldom that a ferry is claimed from a given point to a given point. In *Blissett v. Hart*, Willes 508, Bull. N. P. 76, according to the note of the judgment by Abney, J., the Court say: "A ferry is *publici juris*. It is a franchise that no one can erect without a license from the Crown: and, when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a \*license, the Crown has a remedy by a quo [\*44] warranto, and the former grantee has a remedy by action." In *Pim v. Curell*, 6 M. & W. 234,† a declaration in case for the infringement of a ferry described the ferry as being across the river Mersey "from the township, parish, chapelry, or place of Birkenhead, in the county of Chester, to the parish, township, or place of Liverpool, in the county of Lancaster:" and it was held,—first, that the plaintiff might recover under this declaration, although he proved a ferry both ways, as well from Liverpool to Birkenhead as from Birkenhead to Liverpool,—secondly, that this description did not import a ferry from the whole township, &c., of Birkenhead to the whole parish, &c., of Liverpool; but that the plaintiff might recover on proof of a ferry from any point within Birkenhead to Liverpool. In *Huzzey v. Field*, 2 C. M. & R. 432,† it was held that, where there is an ancient ferry from A. to B., which leads to a public highway, and another constructs a landing-place at C., a short distance from B., and carries passengers over from A. to C., from whence they pass to the same highway upon which the ancient ferry is established, before it reaches any town or village, it is an injury to the ancient ferry, for which an action will lie. Lord Abinger, in delivering the judgment of the Court, says: "It is quite clear that a ferry is a franchise which none can set up without a license from the Crown; and, in the case of a ferry by prescription, a grant or license is presumed. As early as in the Year Book, 22 H. 6, fo. 14 b, it is thus laid down by Paston: 'If I have of ancient time a ferry in the town, and another sets up a ferry upon the same river near to my ferry, so that the profits of my ferry are impaired, I shall have against him an action on the case;' and Newton says, 'The case of a ferry differs from that of a mill, for you are bound to sustain the ferry, to serve and repair it, in \*ease of [\*45] the common people, and it is inquirable before the sheriff in his

tourn, and justices in eire.' This proposition is quoted in 2 Rolle 140 (G), pl. 4, Com. Dig. *Piscarry* (B), and *Action on the Case for a Nuisance*, and in most of the cases in which the rights of ferry have come in question. In the case of *Churchman v. Tunstal*, Hardres 162, in the Exchequer, in the time of the Commonwealth, 1659, the plaintiff, the farmer of a ferry at Brentford, as it would seem, under the Crown, filed a bill for an injunction to restrain the defendant, who had lands on both sides of the Thames, three-quarters of a mile off, and who was in the habit of ferrying passengers across, from continuing to do so. The bill was dismissed without costs; but the reporter adds a query as to the propriety of the decision: and, even if it was right, it is no authority against the maintenance of an action on the case. The decision, however, appears to have been wrong; for, upon another bill filed in 1663, after the Restoration, a decree was made by Lord Hale on the 18th of June, 14 Car. 2, in favour of the same plaintiff, that the new ferry should be put down. In *Blissett v. Hart*, Willes 508, the plaintiff recovered in an action on the case against the defendant for setting up another ferry over the same river near the plaintiff's ferry, and ferrying over persons and horses over the same river near the plaintiff's ferry, by which she was obliged to let it for less rent than before, and had been deprived of great part of the profit of it. On motion in arrest of judgment, the Court held the declaration to be good; and they said that 'a ferry is a franchise that no one can erect without a license from the Crown; and, when one is erected, another cannot be erected without an *ad quod damnum*.(a) \*46] If a second is erected \*without a license, the Crown has a remedy by *quo warranto*, and the former grantee has a remedy by action. The franchise is the ground of the action.' So far the authorities appear to be clear, that, if a new ferry be set up without the King's license, to the prejudice of an old one, an action will lie; and there is no case which has the appearance of being to the contrary, except that of *Tripp v. Frank*, 4 T. R. 666. These old authorities proceed upon the ground, first, that the grant of the franchise is good in law, being for a sufficient consideration to the subject, who, as he receives a benefit, may have, by the grant of the Crown, a corresponding obligation imposed upon him in return for the benefit received; and, secondly, that, if another, without legal authority, interrupts the grantee in the exercise of his franchise, by withdrawing the profits of passengers, which he would otherwise have had, and which he has in a manner purchased from the public at the price of his corresponding liability, the disturber is subject to an action for the injury: and the case is in this respect analogous to the grant of a fair or market, which is also a privilege in the nature of a monopoly. A public ferry, then, is a public highway of a special description, and its termini must be in places where the public have rights, as, towns or vills, or highways leading to towns or vills. The right of the grantee is, in the one case, an exclusive right of carrying from town to town, in the other of carrying from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. Any new ferry, therefore,

(a) For the cases in which the writ of *ad quod damnum* lay, see *Fitzherbert's Natura Brevium* 221--26.

which has the effect of taking away such passengers must be injurious. For instance, if any one should construct a new landing-place at a short distance from one terminus of the ferry, and make a practice of carrying passengers over from the other terminus, and \*there landing them at that place, from which they pass to the same public highway upon which the ferry is established, before [\*47 it reaches any town or vill, and by which the passengers go immediately to the first and all the vills and towns to which that highway leads,—there could not be any doubt that such an act would be an infringement of the right of ferry, whether the person so acting intended to defraud the grantee of the ferry or not.” That judgment almost exhausts the subject, and precisely applies to the facts of this case. In *Yard v. Ford*, 2 Wms. Saund. 171 e, it was held, that, if a new market be erected without patent in a town near to an ancient market, it may be a nuisance, though holden on different days; and therefore, in an action on the case for erecting such new market, to the nuisance of an ancient market, if the jury find for the plaintiff, the Court will not doubt of the nuisance, though it appears that they are holden on different days. There clearly is nothing illegal in the plaintiff’s claim of franchise. [ERLE, C. J.—Suppose a new town built within a short distance of one of the termini of an ancient ferry, to which the inhabitants could not get without committing a trespass, are they precluded from hiring boats to carry them across?] If the plaintiffs permitted that for twenty years without interruption, they would lose their franchise: *Holcroft v. Heel*, 1 Bos. & P. 400. [ERLE, C. J.—The case of a market and that of a ferry are not quite the same, though the mode of creation and encroachment may be the same.] The real question is, whether the plaintiff’s right is to be destroyed or diminished because the place to which the ferry leads has become by progress of time and improvements more populous. In *Kent’s Commentaries*, Vol. III., p. 617 (10th edit.), treating of government grants, it is said: “If the creation of the franchise be not declared to be exclusive, yet it is \*necessarily implied in the grant, as in the case of the grant of a ferry, bridge, or turnpike, or railroad, that [\*48 the government will not either directly or indirectly interfere with it, so as to destroy or materially impair its value. Every such interference, whether it be by the creation of a rival franchise or otherwise, would be in violation or in fraud of the grant. All grants or franchises ought to be so construed as to give them due effect, by excluding all contiguous competition which would be injurious and operate fraudulently upon the grant. The common law contained principles applicable to this subject, dictated by sound judgment and enlightened morality. It declared all such invasions of franchises to be nuisances, and the party aggrieved had his remedy at law by an action on the case for the disturbance, and in modern practice he usually resorts to Chancery to stay the injurious interference by injunction.” And, after referring to the authorities, the learned Commentator adds in the note, “It has been usual in the grant of a franchise to exclude in express terms all interference within specified distances. This practice has become highly expedient, considering the doctrine established in the cases referred to in a subsequent part of this note.(a) By a

(a) Referring to *Dyer v. Tuscaloosa Bridge Company*, 2 Porter’s Alabama Rep. 296, *Jones v.*

general Act in Illinois (Revised Laws of Illinois, 1833), a ferry or toll-bridge created by statute excludes all other establishments of the kind within three miles of the same. So, the Act of Georgia of 21st of December, 1835, creating the Chattahoochee Railroad Company, excludes for twenty-five years all other railroads running parallel thereto within twenty miles. This is in \*affirmance of the

\*49] common-law rule, and it is the wisest course, for, it prevents all uncertainty and dispute as to what are reasonable distances in the given case, and what would amount to an unlawful interference."(a)

*Lush*, Q. C. (with whom were *Raymond* and *Humphrey*), contra.—The questions to be considered are,—first, what is the extent of the plaintiff's right under the grant,—secondly, whether that which has been done by the defendants constitutes an infringement of that right.

1. The plaintiffs claim the right of ferryage from every part of the Isle of Dogs to the opposite side of the Thames from Deptford Creek to Charlton. That is obviously too large a claim. The Isle of Dogs was formerly a marsh with one road across it from the landing-place called Potter's Ferry Stairs to Poplar. According to the evidence of user, the ferry was from the landing-place at this road to Greenwich. That must have been the full extent of the grant; for, it was not competent to the Crown to grant a larger franchise. The definition of a ferry, as given by Lord Abinger in *Huzzey v. Field*, 2 C. M. & R. 432, 442,† is this,—“A public ferry is a public highway of a special description, and its termini must be in places where the public have rights, as, towns or vills, or highways leading to towns or vills. The right of the grantee is, in the one case, an exclusive right of carrying from town to town, in the other, of carrying from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side.” Adopting that as the correct definition,—the grant here could only give the grantees a

\*50] right to carry persons going to Greenwich from the \*road on the opposite side leading to Poplar. A ferry can only exist as connected with a vill or a highway. A grant of a ferry to or from a place where there is neither vill nor highway would be void and inoperative. It appears from the statements in the case that there is no public right of way from the Folly House to Potter's Ferry; and yet it is contended that all persons wishing to cross from any part of the Isle of Dogs to Greenwich must by some means find their way to the plaintiffs' landing-place. Is the grant to be extended because a new neighbourhood has sprung up? [KEATING, J.—You would not, I presume, exclude the plaintiffs from their right to carry all persons coming from Poplar, because Poplar had become considerably extended.] It would still be the vill of Poplar. But it is submitted that the Crown cannot so limit the rights of future generations as to create a monopoly so extensive as is here claimed.

2. Assuming that the Crown had the power to make a grant as claimed here, what has it in fact granted? In the absence of the grant, that is only to be collected from the evidence of user. [BYLES, J.—Coupled with the indenture of 1676 referred to in the special case.]

Johnson, 2 Ala. R., N. S. 746, *Charles River Bridge v. Warren Bridge*, 11 Peters 420, and *Tuckahoe Canal Company v. Tuckahoe Railroad Company*, 11 Leigh, 42.

(a) And see *Peters v. Kendal*, 6 B. & C. 703 (E. C. L. R. vol. 13).

And that user extended only between Greenwich and the old road to Poplar commencing at Potter's Ferry Stairs. The right is limited to the transit between these two places. This being the only road existing at the time of the grant and at the date of the deed of 1876, there was no need of specifying more particularly the termini of the ferry. And the user carries it no further: the alleged right was always exercised to the old highway, and there only. In *Giles v. Groves*, 12 Q. B. 721 (E. C. L. R. vol. 64), and *Blacketer v. Gillett*, 9 C. B. 26 (E. C. L. R. vol. 67), the claim was not made, as here, from the whole of the Isle of Dogs, but "to and from a certain place in the Isle of Dogs." And in *Doust v. Matthews*, \*the plaintiffs consented to abandon their verdict on the general right alleged, and took it upon the more limited right. In *Mat-* [\*51  
*thews*, app., *Peache*, resp., 5 Ellis & B. 546 (E. C. L. R. vol. 85), where the Court of Queen's Bench sustained a conviction of *Matthews* under the *Waterman's Act*, 7 & 8 G. 4, c. lxxv., for working boats within the limits of the Act without a license from the *Waterman's Company*, although he claimed an exemption under the 99th section of the Act (which saves the rights and privileges of the owners of any ferries), in respect of the ferry now in question,—Lord Campbell says: "If the appellant had here been exercising the right of ferry, I should have decided upon quashing the conviction. But it is clear that he was not navigating this boat within the limits of the ferry, any more than if he had been navigating it from Westminster to Lambeth. What is leased, is, 'all that ferry or ferry-place commonly called or known by the name of Potter's Ferry,' 'and also the right of ferryage from the landing-place at the point on the Isle of Dogs opposite Greenwich.' That is to be construed by the facts which we find in the case: and it is there stated that 'there is an ancient ferry (having a legal origin) called Potter's Ferry;' and that 'there is an ancient landing-place in the Isle of Dogs called and known as Potter's Ferry Landing-Place; and the said right of ferry has been exercised between the said ancient landing-place and a place nearly opposite, at Greenwich;' that, though 'upon one or two occasions people were taken off the mud-bank in the boats of the ferry Company at another point of the Isle of Dogs, and conveyed across to Greenwich.' 'there are and for many years have existed at the said Potter's Ferry Landing-Place, in the Isle of Dogs, ferry stairs, and a causeway leading from the said ferry to the water, at which the boats used in working the said ferry commonly have \*been and are kept;' that the trustees 'have been accustomed from time to time to demise the said right of ferry,' [\*52  
and did demise that right to *Doust*, whose servant the appellant was. Now, looking to the ferry as described in the agreement, and as exercised in fact, it is clear that *Doust* was entitled only to a ferryage from Potter's Ferry Landing-Place to Greenwich, and *not from the whole of the Isle of Dogs to Greenwich*. He might as well have taken passengers down to Gravesend. The place from which he did take them was *Cubitt's Landing-Place*, half a mile below Potter's Ferry Landing-Place: that was in law not distinguishable from taking them from a point twenty miles lower down the river. The case is therefore not within the exception in s. 99." The above facts, it is to be observed, are found in a case stated by the lessees themselves. In order to con-

stitute an infringement of the plaintiffs' right of ferry, the carrying complained of must be substantially from and to the same vill. [WILLES, J.—What do you mean by substantially?] It is the language of the authorities. The declaration here contains two counts. The first count is for carrying *in the line of the plaintiffs' ferry*: if the defendants have done that, they have infringed the plaintiffs' right, whether it was done intentionally or not. The second count alleges that the defendants "wrongfully, unlawfully, and for the purpose of evading the ancient ferry of the plaintiffs, and against the will of the plaintiffs, carried and conveyed in a certain boat of the defendants divers foot-passengers for hire over and across the said river Thames, near to the said part of the said river where the plaintiffs had such ferry as aforesaid, and near to the said ferry of the plaintiffs." If the right of the plaintiffs extends all over the Isle of Dogs, the intention is not material; the defendants have infringed that right, if they have

\*53] carried from any part of it. \*If, on the other hand, their right is limited as suggested by Lord Campbell in the case last cited, the defendants have been guilty of no infringement unless they have carried from a point so near to the plaintiffs' ferry as substantially to be an evasion of it. In *Tripp v. Frank*, 4 T. R. 666, it was held, that, if there be an exclusive ferry from A. to B., it does not prevent persons from going by any other boat from A. directly to C., though it be near to B., provided it be not done fraudulently and as a pretence for avoiding the regular ferry. It was there argued, that, "if the conduct of the defendant could be justified in this instance, it would render a right of ferry perfectly nugatory. Every person, then, by going a little to the right or left of the usual track of the ferry, may equally avoid the ferry." But Lord Kenyon said: "If certain persons wishing to go to Barton had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiff's right, and would be the ground of an action. But here these persons were substantially, and not colourably merely, carried over to a different place; and it is absurd to say that no persons shall be permitted to go to any other place on the Humber than that to which the plaintiff chooses to carry them." *Pim v. Curell*, 6 M. & W. 234,† is entirely distinguishable from this case: there, the ferry alleged was, from one township to another township. The ferry here could not in point of law, and does not in point of fact, exist from every part of the Isle of Dogs to Greenwich. A ferry is always from a vill or township (which are synonymous) to another vill or township; no reference is ever made to a parish or

\*54] district.(a) \* "A ferry," says Parke, B., in delivering the judgment of the Court in *The North and South Shields Ferry Company v. Barker*, 2 Exch. 136, 149,† "is a highway for all the Queen's subjects paying the toll." [KEATING, J.—The terms of the indenture of 1676 are, "all that the ferry and ferry-place commonly called or known by the name of Potter's Ferry, with the ferryage, waytage, and passage for men, horses, beasts, and all other cattle and carriages whatsoever over the river Thames, lying, being, and extending itself from a place or marsh called the Isle of Dogs, over the said river Thames into

(a) For the definition of a "vill," see Co. Litt. 115 b, Jacob's Law Dictionary, *Vill* or *Village*, and Tomlyns's Law Dictionary, *Vill*.

the town of Greenwich, in the county of Kent."] Grants of this sort are to be construed strictly. Taking one Poplar passenger would not be an evasion of the plaintiffs' franchise, especially as it is not alleged that the defendants' servants knew the party was going to Poplar. In *Huzzey v. Field*, the passenger was known to be going to Pembroke; and the whole stress of the judgment is based upon that. The Court there expressly decline to come to the conclusion to which the Court is asked to come here. Lord Abinger says,—2 C. M. & R. 442,†—"It does not follow that, if there be a river passing by several towns or places, the existence of a franchise of a ferry over it from a certain point on one side to a point on the other precludes the King's subjects from the use of the river as a public highway from or to all the towns or places on its banks, and obliges them upon all occasions, to their own inconvenience, to pass from one terminus of the ferry to the other. The case of *Tripp v. Frank*, 4 T. R. 666, decided otherwise: and it is not intended to question that decision." In no case has so extensive a claim been set up as a claim to carry all the inhabitants of a district: the claim has always been limited to the carrying from vill to vill, or across a river or arm of the sea so as to form a \*junction with a continuous line of road from a township or vill on the one side to a township or vill on the other. The [\*55 carrying of the single Poplar passenger could hardly warrant a jury in finding an intentional evasion of the plaintiffs' ferry. In the course of the argument in *Pim v. Curell*, 6 M. & W. 251,† Parke, B., says: "There was certainly evidence to go to the jury of the defendants' carrying substantially from the same towns or vill. There is some difficulty in reconciling some of the cases with *Tripp v. Frank*: but this is not the case of carrying one passenger, but of building an hotel, and establishing steamboats, by which they must have carried a multitude." That is the true test of infringement. If the carrying is substantially from a different spot, notwithstanding some of the persons carried would have gone by the plaintiffs' ferry, there is no infringement of the right.

*Pigott*, Serjt., in reply.—Intention is wholly immaterial in a question of this sort. The Court of Exchequer, in *Huzzey v. Field*, 2 C. M. & R. 442,† expressly say, that, "if any one should construct a new landing-place at a short distance from one terminus of the ferry, and make a practice of carrying passengers over from the other terminus, and there landing them at that place, from which they pass to the same public highway upon which the ferry is established, before it reaches any town or vill, and by which the passengers go immediately to the first and all the vill and towns to which that highway leads, there could not be any doubt that such an act would be an infringement of the right of ferry, *whether the person so acting intended to defraud the grantee of the ferry or not.*" No authority has been cited to show that this is not a perfectly legal grant of a ferry from the Isle of Dogs to Greenwich. It has never been suggested throughout all the \*numerous contests to which these parties have been exposed, [\*56 that their claim was too large. The claim was infinitely larger in *Pim v. Curell*, 6 M. & W. 234.† In Liverpool there are scores of streets running down to the Mersey, and a very numerous population. If the question were one of convenience, the confining the right of

ferryage to one place in Liverpool bears no comparison to the very moderate right claimed by these plaintiffs. There is no pretence for limiting the franchise to the conveyance of Poplar people: the Isle of Dogs Ferry has nothing whatever to do with Poplar. [ERLE, C. J.—Your claim is, to make people come to Potter's Ferry Stairs who do not want to come there, and who have no convenient mode of access to that place.] That is merely because at the time of the grant there was no other way of getting across. The simple question is, whether the plaintiffs' rights,—rights which they have been in the enjoyment of for more than two hundred years without interruption,—are to be annihilated and destroyed merely because Mr. Cubitt has thought fit to build a new town upon this marsh. *Cur. adv. vult.*

WILLES, J., delivered the judgment of the Court:—

In the first count of the declaration the plaintiffs complain that the defendants had carried passengers in the line of their ferry; in the second, that they had so done near that of the said ferry, for the purpose of evading it.

The defendants carried to Greenwich passengers from Cubitt's Pier, which is on the eastern side of the Isle of Dogs, distant 1280 yards from Potter's Ferry Stairs, on the south side of that isle. The area of the isle is about one square mile. It is bounded by the Thames \*57] on three sides out of four. It was an \*uninhabited marsh down to 1800, with one roadway from Poplar on the north, to Potter's Ferry Stairs on the south; and at that time the passengers going along that road comprised all the passengers from the Isle of Dogs. Since 1800, it has become and now is populous, and covered with manufacturing and commercial establishments. Cubitt's Pier was made for the accommodation of Cubitt Town, built on the bank of the Thames at some distance from the roadway before mentioned, and only connected therewith by ways which the owner of the land has chosen to dedicate to the public.

Upon these facts, the questions are,—first, did the defendants carry within the line of the plaintiffs' ferry? and, if not,—secondly, did they carry near to it, for the purpose of evading it?

In order to answer the first question, the extent of the plaintiffs' ferry must be ascertained. The plaintiffs claim the exclusive right of carrying all who pass from any part of the isle to Greenwich. In support of their claim they rely on a deed of 1676, and on usage. A part of the description of the ferry in the deed of 1676, taken by itself, tends to support this claim,—“All that ferry extending itself from a place or marsh called the Isle of Dogs, over the Thames, into the town of Greenwich.” But, although these words may mean that every person passing from the Isle of Dogs to Greenwich must go by this ferry, there are other parts of the description which refer to usage; so that the extent must be ascertained thereby. It is a ferry commonly called and known as “Potter's Ferry.” Usage must prove the application of this description. The concluding words also, viz., “in as ample a manner as the same hath heretofore been used, occupied, or enjoyed,” make the limits depend on usage. Furthermore, the \*58] nature of the franchise seems to be \*repugnant to the plaintiffs' claim of a ferry from every part of the isle indiscriminately.

A ferry exists in respect of persons using a right of way, where the

line of way is across water. There must be a line of way on land, coming to a landing-place on the water's edge (as in this case, to Potter's Ferry Stairs), or, where the ferry is from or to a vill, from or to one or more landing-places in the vill. The franchise is established to secure convenient passage; and the exclusive right is given because in an unpopulous place there might not be profit sufficient to maintain the boat, if there was no monopoly. The ferry is unconnected with the occupation of land, and exists only in respect of persons using the right of way. The questions, whence they come, and whither they go, are irrelevant to the exercise of that right: and the ferryman has no inchoate right in respect of any of them, unless they come to his passage.

Such being the nature of a ferry, the notion that a large area of land should be subjected to the servitude that the owners and occupiers thereof should be prohibited from using the highway of the Thames as they may choose, and should be under an obligation to get to the highway leading from Potter's Ferry Stairs, and cross to Greenwich only therefrom, is anomalous: and, if Cubitt Town had been built without a way therefrom to the road to Potter's Ferry, the performance of the supposed obligation would necessitate a trespass.

The cases on the nature of a ferry are few: and we cite only *Paine v. Partrich*, Carth. 191. There, the Court decided that case did not lie for an obstruction of a highway, without special damage; that a passage over the water is of the same nature as a highway for all people; and that the plaintiff, who claimed as an inhabitant of Littleport, had not the passage as such inhabitant, but as a subject.

\*If the line of the plaintiffs' ferry be taken to be from Potter's Ferry Stairs only, and not from the whole isle, the defendants [\*59 have not carried in that line, and the first count fails.

The second count, charging that the defendants carried near the line of ferry, for the purpose of evading it, raises another question. The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way: and, if the alleged wrongdoer makes a landing-place near to the ferry landing-place, so as to be in substance the same, making no material difference to travellers, such a wrongdoer would be guilty of the wrong complained of in the second count: he would indirectly carry in the line of the plaintiff's ferry.

Then, have the defendants done this wrong? We think not. Cubitt Town is at such a distance from Potter's Ferry as is substantially important for those who have to pass therefrom to Greenwich: and it is found that the defendants had not the purpose of evading the plaintiffs' ferry, or of diverting traffic therefrom.

The principle by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable, has not been clearly laid down. It seems reasonable to infer, that, if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway: and it is obvious that the single landing-place which sufficed for an uninhabited

marsh, would be utterly inadequate for several towns thronged with industrial mechanics. If one hundred of such labourers pass now to  
 \*60] Greenwich \*where one traveller passed in 1800, it seems oppressive to fix on such a large number of labourers the perpetually repeated loss of three-quarters of a mile of walking, for the sake of the small fraction of the toll which is the profit on each passenger, and unreasonable so to increase that profit. If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable.

The authorities do not define, either in respect of ferries or markets, or the like, what proximity is actionable. Fleta, Lib. 4, c. 28, s. 13, describes the proximity of a new market which is actionable, to be seven miles, on the calculation of twenty miles a day for each person's travelling; and he therefore allows seven miles out and seven back, and time for marketing besides. Such a limit, on such a reason, might be suited to the simple wants of a rude life, where inhabitants are few, but is unfitted for large towns, where daily wants are greatly multiplied. Under the latter circumstances, it seems that the area within which a new market would become actionable would be diminished from a diameter of fourteen miles by the public need; and, on the same reasoning, the area for the monopoly of a ferry would depend on the need of the public for passage.

We now proceed to the cases. The dictum of Paston, in 11 H. 6, fo. 14, only affirms that case will lie for infringing the right of a ferryman, and does not touch the question of proximity. In *Churchman v. Tunstal*, Hardres 162, the complaint, by English bill, was, that the defendant carried over the Thames, in Brentford, three-quarters of a mile below the plaintiff's ferry for horses and passengers, and an injunction was prayed to stop it: the defendant contended that the restraint which the plaintiff would lay on others was uncertain,  
 \*61] \*and at too great a distance: and the Court decided for him, because it came too near to a monopoly, and restrained trade. The decision by Lord Hale between the same parties, is said, in *Huzzey v. Field*, 2 C. M. & R. 432,† to have been different; but neither the point of law, nor the facts on which Lord Hale acted, are stated. In *Tripp v. Frank*, 4 T. R. 666, the plaintiff's ferry was from Hull to Barton. The defendant carried from Hull to Barrow, two miles below Barton, on the Humber. The judgment is for the defendant. Lord Kenyon says—"If a person wishing to go from Hull to Barton had applied to the defendant, and he had carried them a little above or below the ferry, it would be a fraud on the plaintiff's right, and a cause of action. But here these persons were substantially and not colourably carried to a different place." And Ashburst, J., adds, in effect, that it is unreasonable to require that a person crossing the Humber must be carried out of his way, on account of the plaintiff's ferry.

In *Huzzey v. Field*, 2 C. M. & R. 432,† the plaintiff had a ferry from Nayland to Pembroke Point. The main highway from Haverford to Pembroke passed by Nayland, and thence over the water to Pembroke Point, and so to Pembroke. Afterwards traffic to Milford Haven increased, and Pater Dock was built, and a landing-place at Hobbes's Point, half a mile from Pembroke Point, was made,—it being

required for the accommodation of traffic in lines other than that from Haverford to Pembroke. The defendant took a passenger in his boat from Nayland Point, who, when afloat, ordered him to Hobbes's Point, saying he was going to Pembroke. The question was, whether these facts proved a disturbance of the ferry: and it was answered in the negative. The Court describes a disturbance to be either by carrying from point to point, \*or by constructing a landing-place at a short distance from one terminus of the ferry, and carrying passengers thereto who were in reality passing along the line of way on which the ferry is situate. But, as it appeared in the case there were other places than Pembroke to which the passenger might be going from Hobbes's Point, without or before going to Pembroke, and if there was a convenience to him in landing at Hobbes's Point, which he could not have had by landing at Pembroke Point, he would not evade the plaintiff's ferry by landing at Hobbes's Point. [\*62]

In the last two cases, the ferry was backwards and forwards, and the question arose in respect of the terminus ad quem. The law would have been precisely the same, as far as the consideration of convenient accommodation operates, if the question arose respecting the terminus à quo, as it necessarily does in this case, where the ferry is only one way. But these general principles, and their specific application to Potter's Ferry, were considered in *Matthews, app.*, *Peaché, resp.*, 5 *Ellis & B.* 546 (*E. C. L. R.* vol. 85), and the judgment was decisively in point for the defendants. The information was for plying as waterman, without a license. The defence was, that the defendant was exempt as a ferryman ferrying in Potter's Ferry from Cubitt's Dock, which is 800 yards from Potter's Ferry Stairs, to Greenwich. The Court decided that the ferry is from the stairs, and not from the Isle of Dogs to Greenwich, the indefinite words of the conveyance being defined by the exercise of the right; and that therefore the exemption for ferries did not extend to Cubitt's Dock, distant 800 yards. A fortiori it does not extend to Cubitt's Pier, which is 1280 yards distant from the ferry.

Therefore, upon principle and authority, it appears that the plaintiffs have neither the privileges nor the burthens of a ferry from Cubitt's Pier, and that all the \*Queen's subjects being at Cubitt's Pier, whether from Poplar or elsewhere, have a right [\*63] to use the highway of the Thames therefrom either to Greenwich or elsewhere at their free will and pleasure, either by wherries or steamer.

It follows that no right of the plaintiffs is shown to have been infringed by the defendants, and that the defendants are entitled to our judgment.

Judgment for the defendants.

The question raised in *Newton v. Cubitt* assumes in this country a somewhat different shape, though substantially the same point is presented for determination. Whether any infringement has been made upon the franchise becomes, by virtue of the prohibition against impairing the obligation of con-

tracts, a constitutional question. This clause of the constitution is a protection against legislative violations of the franchise, and thus brings the question back to the common law point, viz. what constitutes an infringement upon the franchise.

Chancellor Kent's statement of the

law, quoted by the learned serjeant for the plaintiffs, was accurate at the time it was written; but *The Charles River Bridge Co. v. The Warren Bridge Co.*, 11 Peters 420, reversed the law upon this point. Mr. Justice Story in his dissenting opinion gives an elaborate *résumé* of the common law. But the doctrine of expediency prevailed. The confines of exclusion on either side of the line of travel, being indefinite, were held not to exist. Compensation for the violation of a nonentity was naturally not to be thought of; yet Prof. Greenleaf, in his attempt at the justification of the decision of the Court, argues that compensation should be made by the legislature—a most illogical sequence: Greenleaf's *Cruise on Real Property*, tit. "Franchises," § 29, note. Where the charter defined the limits within which the franchise was to be exclusive, compensation must be made: *The*

*Enfield Bridge Co. v. The Hartford and New Haven Bridge Co.*, 17 Conn. (1845) 40. A free ferry is an invasion of the franchise, which aggravates the nuisance: *Aikin v. The Western Railroad Company*, 6 Smith (New York Court of Appeals, 1859) 370. A legislative provision, however, that, if the plaintiffs would erect and maintain a bridge, the ferries between the two opposite towns should be for ever discontinued, was held not to incapacitate the legislature from chartering another company to establish a ferry between the same towns: *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. (1860) 210. See also *Bridge Proprietors v. Hoboken Co.*, 2 Wallace (U.S. Supreme Court, 1864) 116. The cases upon the subject are fully collected in Greenleaf's *Cruise*, *supra*, and in the 10th ed. of Kent's *Com.*, 1 vol., 618–19, notes.

## BRANLEY v. THE SOUTH EASTERN RAILWAY COMPANY.

May 12.

The legality of a contract is determined by the *lex loci contractus*.

A railway Company incorporated for the conveyance of passengers and goods from London to Folkestone under Acts of Parliament which prohibited them from making unequal charges, obtained another Act enabling them to establish a communication by steam-vessels with Boulogne, which last-mentioned Act contained no provision as to equality of rates for the carriage of goods. There was nothing in the law of France which disabled the Company as public carriers from making such contracts for that purpose as they might think most for their own interest. The Company by their tariff charged certain rates for small parcels, with a double charge for "packed parcels:"—Held, that, so far as regarded the contract for the carriage of such parcels from *Boulogne to London*, there was nothing illegal in this increased charge.

THIS was an action brought against the South Eastern Railway Company to recover back sums alleged to have been improperly exacted by them from the plaintiff for the carriage of parcels from Boulogne to London.

The declaration consisted of a count for money received and for money found due upon accounts stated. The defendants pleaded never indebted.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—The plaintiff is a carrier whose business it is to collect small parcels at Boulogne, to be forwarded to London, *viâ* Folkestone, by means of what are called "packed parcels" addressed to Messrs.

\*64] Wheatley & Co., Leadenhall Street, London, \*and to receive in like manner parcels from London for distribution at Boulogne.

The defendants are a railway Company also carrying on business as carriers from London to Dover and Folkestone under the authority of the 6 W. 4, c. lxxv., and several subsequent statutes,<sup>(a)</sup> and also carrying on a communication by means of steam-vessels between the ports of Folkestone and Dover, and those of Boulogne and Calais, under the authority of the 16 & 17 Vict. c. clvi.

By the 17th section of one of their Acts, 2 Vict. c. xlii., the Company were bound to charge to all persons alike for the conveyance of the like goods under the like circumstances;<sup>(b)</sup> and by their tariff, which was put in, a certain scale of charges was provided for parcels and packages up to the weight of 112 lbs., with an intimation that "packed parcels" would be charged \*double those rates. The Company's right to this increased charge for packed parcels was [\*65 negatived by this Court in the case of *Piddington v. The South Eastern Railway Company*, 5 C. B. N. S. 111 (E. C. L. R. vol. 94), where the contract was made in *London*, for the conveyance of packed parcels to Boulogne: and the question was whether the same rule was to be applied to parcels delivered to the Company at Boulogne to be delivered in London.

On the part of the plaintiff, it was insisted that the contract, having been made in France, though it was to be performed in England, was to be governed by the French law; and to prove this M. Jules Bourdaloux, an advocate, was called. He stated that he was acquainted with the French law relating to the transport of merchandise; that, in France, carriers are of two sorts, viz. public carriers, such as railway Companies, whose charges are regulated by a general law, and private entrepreneurs, whose charges are regulated by agreement; that the French law does not apply to English Companies, who are merely considered as private entrepreneurs; that, before the formation of railways in France, there was no law fixing a tariff for public Companies; and that, if they took goods without agreement, they must take the prices fixed by the tribunal, which would probably be the reasonable prices as usually charged by carriers; and that the railway Companies in France had attempted to prevent the transmission of packed parcels (*colis groupés*), and that, after some contrariety of decision, the Court of Cassation had ultimately decided against them.

It was admitted, for the purpose of the cause, that the Company incurred no additional trouble or risk from the transmission of packed parcels.

On the part of the defendants, it was submitted that this contract,

(a) The 7 W. 4 & 1 Vict. c. xciii., 2 & 3 Vict. c. xlii., 2 & 3 Vict. c. lxxix., 3 & 4 Vict. c. lvi., 5 & 6 Vict. Sess. 2, c. iii., 6 & 7 Vict. cc. li., lii., and lxii., 7 & 8 Vict. cc. xxv., lxix., and xci., 8 & 9 Vict. cc. clxvii., clxxxvi., cxvii., and cc. 9 & 10 Vict. cc. lv., lvi., & lxiv., cccv., and cccxxxix., 10 & 11 Vict. cc. oiv., and cccxxx., 13 & 14 Vict. c. xxxi., and 15 Vict. c. ciii.

(b) "The charges by the said recited Acts or either of them authorised to be made for the carriage of any passengers, goods, animals, or other matters or things to be conveyed by the said company, or for the use of any steam-power or carriage to be supplied by the said Company, shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion of the line; and no reduction or advance in any charge for conveyance by the said Company, or for the use of any locomotive power to be supplied by them shall be made either directly or indirectly in favour of or against any particular Company or person travelling upon or using the same portion of the said railway."

\*66] having been made in France, must be \*governed by the French law, and that there was nothing in the French law, as proved by M. Bourdaloux, to negative the right of the Company to charge the sums mentioned in their tariff, which must be assumed to have been the basis of their contract with the plaintiff. And reliance was placed upon the 129th and 133d sections of the 6 W. 4, c. lxxv., and the 16th and 17th sections of the 16 & 17 Vict. c. clvi.(a)

\*67] \*A verdict was entered for the plaintiff for 11*l.* 19*s.* 11*d.*, the amount of the alleged overcharges, leave being reserved to the defendants to enter a verdict for them, if the Court should be of opinion that there was no evidence to go to the jury of the defendants' liability.

*T. Jones*, in Michaelmas Term last, obtained a rule nisi accordingly.

*Lush*, Q. C., and *J. Brown* showed cause.—The right of railway Companies to charge an additional or increased rate for the conveyance of packed parcels was negatived by the Court of Exchequer in *Crouch v. The Great Northern Railway Company*, 9 Exch. 556,† 11 Exch. 742,† and by this Court in *Piddington v. The South Eastern Railway Company*, 5 C. B. N. S. 111 (E. C. L. R. vol. 94).(b) If that be the law where the parcel is delivered to the railway Company in England, can it make any difference that they receive the parcel at Boulogne, to which place they are authorized by the 16 & 17 Vict. c. clvi. to extend their traffic?(c) [WILLES, J., referred to *Leroux v. Brown*, 12 C. B. 801 (E. C. L. R. vol. 74), where the Statute of Frauds

(a) The 129th section of the 6 W. 4, c. lxxv., enacted that "it should be lawful for the said Company, and they were thereby authorized, if they should think proper, to use and employ locomotive engines or other moving power, and in carriages or wagons drawn or propelled thereby to convey upon the said railway and also along and upon any other railway communicating therewith, all such passengers, cattle, and other animals, goods, wares, and merchandise, articles, matters, and things, as should be offered to them for that purpose, and to make such reasonable charges for such conveyance as they might from time to time determine upon in addition to the several rates or tolls by that Act [ss. 126, 127] authorized to be taken: Provided always, that it should not be lawful for the said Company, or for any person using the said railway as carriers, to charge for the conveyance of any passenger upon the said railway any greater sum than the sum of 3*d.* per mile, including the toll or rate thereinbefore granted."

And s. 133 enacted "that it should be lawful for the said Company from time to time to make such orders for fixing and by such orders to fix the sum to be charged by the said Company in respect of small parcels (not exceeding 100 lbs. weight each) as to them should seem proper: Provided always, that the provision thereinbefore contained should not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature, which might be sent upon the railway at the same time."

The 16th section of the 16 & 17 Vict. c. clvi., enacts "that the South Eastern Company may charge for the conveyance of passengers in the steam-vessels worked or employed by them such reasonable rates as they think proper, not exceeding the rates following, to wit, passengers between Folkestone or Dover and Boulogne or Calais,—first class, 8*s.* each; second class, 6*s.* each."

The 17th section enacts "that such steam-vessel rates shall be at all times charged to all persons equally and after the same rate in respect of passengers conveyed in a like vessel passing between any of the ports aforesaid under the like circumstances; and no reduction or advance in any such rate shall be made in favour of or against any person using the steam-vessels, in consequence of such person having travelled over the whole or any part of the railway, or not having travelled upon any part thereof."

(b) See *Baxendale v. The Eastern Counties Railway Company*, 4 C. B. N. S. 63 (E. C. L. R. vol. 93).

(c) This statute is entirely confined to passenger traffic.

was held a bar to an action in the Courts of this \*country brought to enforce a contract made at Calais,—the statute applying only [\*68 to the procedure.] One gross sum is charged for the whole transit. [ERLE, C. J.—What can an English Company have to do with the coast of France?] Are they to be absolved from all the obligations which the Acts of Parliament impose upon them, when they receive a parcel at Boulogne to be carried by them to London? Their status at Boulogne does not affect their contract to carry to London. They could not have possessed steam-vessels but for the 16 & 17 Vict. c. clvi.: *The East Anglian Railways Company v. The Eastern Counties Railway Company*, 11 C. B. 775 (E. C. L. R. vol. 78). [KEATING, J.—The Company could not perform the contract made at Boulogne without the assistance of the English Act of Parliament.] It is a fallacy to call this a contract made at Boulogne: there was no contract there; it was a mere bailment of the goods to the Company there. The Company can only contract in the manner and to the extent to which their Acts of Parliament authorize them to contract: and their contracts must be regulated and governed by the English law. Dr. Story seems to lay it down that the qualified authority to contract follows the Company into the foreign country. In § 51, he says: “All laws which have for their principal object the regulation of the capacity, state, and condition of persons, have been treated by foreign jurists generally as personal laws. They are by them divided into two sorts, those which are universal, and those which are special. The former (universal laws) regulate universally the capacity, state, and condition of persons, such as their minority, majority, emancipation, and power of administration of their own affairs. The latter (special laws) create an ability or a disability to do certain acts, leaving the party in all other respects with his general capacity or incapacity. But, whether laws purely personal belong \*to the one class or to the other, they are for the most part held [\*69 by foreign jurists to be of absolute obligation everywhere, when they have once attached upon the person by the law of his domicil. Boullenois has stated the doctrine among his general principles.” In § 51 *a*, he proceeds,—“Froland, Bouhier, Rodenburg, Paul Voet, Pothier, and others (Abraham a Wesel, Stockmannus, and Merlin), lay down a similar rule.” And, after citing passages from the works of those distinguished jurists, he goes on, § 51 *b*,—“Paul Voet, on the other hand, speaks in far more qualified language, and lays down several rules on the subject,—1. That a personal statute only affects the subjects of the state or territory wherein it is promulgated, and not foreigners, although doing some business there, ‘Statutum personale tantum officit subditos territorii ubi statutum conditum est; non autem forenses licet ibidem aliquid agentes.’ 2. That, as a personal statute does not affect a person out of the territory, it cannot therefore be reputed to be the same without the territory as it is within. ‘Statutum personale non officit personam extra territorium; sic ut pro tali non reputetur extra territorium, qualis erat intra.’ 3. That a personal quality cannot be added out of the territory to a person not a subject. ‘Personalis qualitas non potest extra territorium addi personæ non subjectæ.’ 4. A personal statute accompanies the person everywhere in respect to property (biens) situate within

the territory of the state where the person affected by it has his domicil. 'Statutum personale ubique locorum peronam comitatur, in ordine ad bona intra territorium statuentis sita, ubi persona affecta domicilium habet.' We rely on the distinction suggested by Paul Voet. [WILLES, J.—A good illustration is afforded by the case of *Santos v. Illidge*, 8 C. B. N. S. 861 (E. C. L. R. vol. 98), where some \*70] members of the Court held that a \*contract for the sale of slaves, prohibited by the 5 G. 4, c. 113, is void where entered into by British subjects, though in a country where slavery is lawful. ERLE, C. J.—A foreign Company has a locus standi here; and so, no doubt, has an English Company in a foreign country. We make no inquiry as to the constitution of a foreign Company, any more than we should into the generation of an individual suing here.] This is a contract made by the defendants in relation to the conveyance of goods by their railway in this country. It can only be regulated by the general law which for the benefit of the public defines their powers to contract. The 17th section of the 2 Vict. c. xlii., prescribes equality of charge in respect of all passengers and goods: and their rights and liabilities are in no degree altered by the circumstance of a subsequent statute (16 & 17 Vict. c. clvi.) enabling them to extend their powers of carrying across the Channel. Nothing is done by the Company on the French territory except the landing and shipping of passengers and goods there. No part of the transit takes place in that country. In several of the cases where equality of charge has been enforced) the journey has been performed partly on the Company's own line and partly on lines not under their control, and even out of England: see *Crouch v. The London and North Western Railway Company*, 14 C. B. 255 (E. C. L. R. vol. 78).

*T. Jones*, in support of the rule.—The substance of the evidence given by M. Bourdaloux, the French advocate, is, that, in France, an ordinary carrier may make what contract he pleases; there is nothing to hinder him, if he so please, from charging double for *colis groupées*. We may therefore assume that this was a lawful contract in the place where it was made: the only question is, whether there is anything \*71] in any \*of the Company's acts to render such a charge illegal. [KEATING, J.—Where a contract is made in one country, to be performed in another, by which law is the contract to be governed?] "The interpretation of the contract must be governed by the law of the country where the contract was made,—*lex loci contractus*; the mode of suing, and the time within which the action must be brought, must be governed by the country where the action is brought,—in *ordinandis judiciis, loci consuetudo ubi agitur*: Per Tindal, C. J., in *Trimbey v. Vignier*, 1 N. C. 151, 159 (E. C. L. R. vol. 27), 4 M. & Scott, 695, 704 (E. C. L. R. vol. 30). [WILLES, J.—In *Allen v. Kemble*, 6 Moore's P. C. 314, it was held, that, if a bill of exchange is drawn in one country and payable in another, and the bill is dishonoured, the drawee is liable according to the *lex loci contractus*, and not according to the law of the country where the bill was made payable. It was upon that principle that interest was given at the current rate of the country where the dishonoured bills were drawn (*California*), in the case of *Gibbs v. Fremont*, 9 Exch. 25.†] The law was so laid down by Lord Eldon in *Male v. Roberts* 3 Esp. N. P. C.

163, where the question arose as to a plea of infancy to an action for necessities supplied in Scotland. Before the passing of the 16 & 17 Vict. c. clvi., the Company were limited to the carrying of passengers and goods between London and Folkestone and Dover. That Act authorizes them to establish vessels for the conveyance of passengers to Calais and Boulogne, and to take "tolls" in respect of such steam-vessels (s. 15). By s. 16 a maximum toll is given for passengers, which by s. 17 is to be charged equally. But there is no equality clause for the sea-transit of goods: the difference of charge here may therefore be referred to that part of the journey. [ERLE, C. J.—That would be matter of proof.] *Cur. adv. vult.*

\*ERLE, C. J., now delivered the judgment of the Court: (a) [\*72]

This was an action to recover back sums alleged to be over-charges for packed parcels carried from Boulogne to London.

It appeared that the defendants were a Railway Company under 6 W. 4, c. lxxv., and other statutes, and a Steam-packet Company under the 16 & 17 Vict. c. clvi., by which latter Act they were authorized to maintain a packet communication between Boulogne and Folkestone. The contract under which the money was paid was made at Boulogne with the Company, trading under the last-mentioned Act, according to the tariff published at Boulogne, and known to the plaintiff before he made any of the consignments in respect of which the alleged overcharges were made: and the question is, whether he has a right to treat that contract as a nullity, and, after receiving the consideration for which the price was paid, claim to alter the contract and fix a lower price, and recover back the excess which as he alleges he has paid.

As a general rule, the *lex loci contractus* governs in deciding whether there was illegality in the contract; and, according to the law of France, there was nothing illegal. The Company were carriers under no legal restriction, and having capacity to make their contracts as they might think most for their own interest.

Even if the railway legislation for England could be construed to have an extra-territorial effect, and to impose on an English railway Company in France, the capacities and incapacities with which they are affected in England, still that point does not now arise, because the statute creating the Steam-packet Company leaves that Company free to make any contracts for goods which they may choose. It contains no regulations for charges in respect of goods, although by ss. 16 and 17 it establishes a maximum for the charges in respect of passengers. Section 15, relating to tolls, possibly may refer to the tolls of the Whitstable Company purchased by the defendants under this statute. Certainly there is nothing to connect it expressly with the transit of goods.

Part of the argument was addressed to the consideration of what was reasonable and equal. But, except in cases within the provisions of the Railway Acts, as a general rule, a contracting party who has made a contract must abide by it: and we have no jurisdiction to alter contracts by reference to equality.

In this ground of decision the Court is unanimous: but, if the parties should resort to a Court of error, I desire to add, that, in my

(a) The case was argued before Erle, C. J., Willes, J., and Keating, J.

separate opinion, the defendants are also entitled to judgment, if the railway legislation of England does apply to the contract made by this Company in France.

The statute 6 W. 4, c. lxxv., s. 133, empowered this Company to charge what to it should seem proper in respect to parcels not exceeding 1 cwt. Under this statute the law is clear: any charge which to the Company has seemed proper is made lawful, or, rather, is declared to be so, for it was lawful by the common law.

Under the 2 Vict. c. xlii., s. 17, the Company is commanded to charge equally to all persons in respect of all goods of a like description. This command the defendants have in my opinion obeyed: they have charged equally to all persons for all goods coming under the description of packed parcels without making any difference between them and parcels called enclosures in former decisions. The Company \*74] has a right \*to divide goods into classes, by descriptions appropriate to the different classes it chooses to make. And the charges for parcels which they choose to make under the first Act are not affected by the second Act, if the jury distinguishes the different descriptions, and finds the charge for each description made equally to all customers. The cases which are supposed to decide that an extra charge for a packed parcel is unlawful, do not make this distinction. In them the Company claimed to charge extra to carriers for packed parcels, and not to charge extra to customers not carriers, for what they called enclosures, which were in reality packed parcels. The question for the jury in each of those cases was, whether one aggregate of small parcels made up by a customer not a carrier, was of a like description with the same aggregation made up by a carrier; and the jury have found that it was: and upon that finding the Courts have held that the extra charge for a packed parcel to a carrier was against the command in the last-mentioned statute or similar statutes analogous thereto: see *Parker v. The Great Western Railway Company*, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott N. R. 835, and 11 C. B. 545 (E. C. L. R. vol. 73), and *Crouch v. The Great Northern Railway Company*, 9 Exch. 556,† and 11 Exch. 742.†

It is not necessary for the decision of the present case for me to say more on this point, or to go into an examination of the authorities, because the Court agrees in the judgment on the first point. On the second point, I repeat that I express only my own opinion exclusively.

WILLES, J.—I concur entirely with the judgment pronounced by my Lord, simply upon the ground that the Railway Acts do not apply to sea-transit, and that the 16 & 17 Vict. c. clvi. makes no provision for equality of charges in respect of the subject-matter in question,—\*75] \*the whole provision being only for charges in respect of passengers, none in respect of the carriage of goods; and the obligation of the carrier at common law being to charge reasonably, but not to charge equally.

KEATING, J.—I concur, upon the grounds stated by my Lord.

Rule absolute.

## VAN TOLL v. THE SOUTH EASTERN RAILWAY COMPANY.

*April 17.*

The plaintiff, a passenger by the South Eastern Railway, on arriving at the terminus at London Bridge, deposited in the cloak-room there a bag containing wearing apparel and jewellery to a value considerably exceeding 10*l.*, receiving as a voucher a ticket on the back of which was printed the following notice:—"The Company will not be responsible for articles left by passengers at the station, unless the same be duly registered, for which a charge of 2*d.* per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1*d.* per diem, in addition, will be made on all articles left in the cloak-room for a longer period than twenty-four hours. The Company will not be responsible for any package exceeding the value of 10*l.*"

A similar notice printed in large characters was posted up in the office; but the plaintiff swore that she did not see it. She was not asked whether or not she had seen the notice on the back of the ticket; but she produced it when she applied for the bag. Through the negligence of the Company's servants, part of the contents of the bag were abstracted whilst it was in their custody:—

Held, that the Company, having received the deposit, not as carriers, but as ordinary bailees, upon the terms contained in the printed notice,—which the plaintiff, having the means of ascertaining them, must be taken to have consented to be bound by,—were not responsible for the loss; and that the case was neither within the Carriers' Act (11 G. 4 & 1 W. 4, c. 68), nor the Railway Traffic Act, 17 & 18 Vict. c. 31.

THIS was an action charging the plaintiffs as carriers with the loss of goods intrusted to them.

The declaration stated, that, in consideration that the plaintiff would deliver to the defendants (being public carriers of goods for hire) certain goods of the plaintiff to be by the defendants safely and securely kept and retained and redelivered to the plaintiff on request, for reward to the defendants in that behalf then and there paid, the defendants promised the plaintiff safely and securely to keep the said goods, and to redeliver the same to the plaintiff on request: Averment that the plaintiff did deliver to the defendants, and the defendants accepted the said goods of the plaintiff for the purpose and on [\*76 the terms aforesaid, and that the plaintiff afterwards, and within a reasonable time in that behalf, requested the defendants to redeliver the same to the plaintiff; and that, although all conditions had been fulfilled, and all things had happened, and all times had elapsed necessary to entitle the plaintiff to maintain this action, yet the defendants did not redeliver the same to the plaintiff, and did not safely and securely keep the same, but so negligently conducted themselves in the premises that a great part of the said goods, to wit, to the value of 80*l.* (describing them), had been and were wholly lost to the plaintiff, and the rest injured and destroyed: Special damage: Claim 40*l.*

The defendants pleaded,—first, non assumpsit,—secondly, that the plaintiff did not deliver to the defendants, nor did they accept the said goods, for the purpose and on the terms alleged,—thirdly, that they were induced to make the alleged promise by the fraud and misrepresentation of the plaintiff,—fourthly, that they made the said promise and accepted the said goods upon and subject to a certain condition, that is to say, that they would not be responsible for the same if the value thereof (which was then unknown to the defendants) then exceeded 10*l.*, and that the value of the said goods

did then exceed 10*l.*,—fifthly, that they did safely and securely keep the said goods, and redelivered the same to the plaintiff on request, according to their said promise in that behalf. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Michaelmas Term, when the following facts appeared in evidence:—The plaintiff, a lady who resided at Guildford, came thence to the London Bridge terminus of the South Eastern Railway \*77] on the morning of the 6th of August, 1861, with a leather bag containing some articles of wearing apparel, a gold watch, and several gold rings, of the value all together of about 40*l.* On her arrival, she deposited the bag with a servant of the defendants in the cloak-room, paying 2*d.*, and receiving from him a ticket bearing the number 722, and having printed on the back of it in very small type the following notice:—

“The Company will not be responsible for articles left by passengers at the station, unless the same be duly registered, for which a charge of 2*d.* per article will be made, and a ticket given in exchange: and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1*d.* per diem, in addition, will be made on all articles left in the cloak-room for a longer period than twenty-four hours. The Company will not be responsible for any package exceeding the value of 10*l.*”

A gentleman who had on the same day deposited an umbrella in the cloak-room, by some mischance had received a ticket also numbered 722. Having sent a messenger with his ticket to the station, the messenger, instead of the umbrella, brought back the plaintiff's travelling-bag; and when the plaintiff returned to the station in the afternoon, the bag was not to be found, and she went away desiring that, if found, it should be forwarded to her at Guildford. When the owner of the umbrella discovered the mistake, he returned the bag to the cloak-room, and it was sent to Guildford, but, on its arrival there, it was found to have been opened, and some of the contents were missing.

Upon the question being left to them, the jury found that the bag \*78] had been opened and the contents abstracted from it while in the custody of the Company; and that the Company had been guilty of negligence.

It was admitted by the plaintiff that no intimation was given to the Company's servant at the time the bag was deposited that it contained jewellery, or that its value exceeded 10*l.* And it was proved that a copy of the notice, printed in large letters, was hung up in the office where the goods were received: but there was no proof that the plaintiff had read either that or the endorsement on the ticket; and she herself stated that she had not seen the former.

On the part of the defendants, it was submitted that the plaintiff was bound by the terms of the notice, which constituted the contract between the parties.

On the other hand, it was insisted, that, even assuming that the notice had been proved to have come to the knowledge of the plaintiff, the case was within the 7th section of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), which enacts that the Company

shall be liable for negligence or default in the carriage of goods, notwithstanding a notice to the contrary, and provides that "no special contract between such Company and any other parties respecting the receiving, forwarding, or delivery of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage."

A verdict was taken for the plaintiff for 20*l.*, leave being reserved to the defendants to move to enter a verdict for them on the second or fourth issue, if the Court should be of opinion that the notice afforded a defence to the action,—the Court to be at liberty to draw such inferences from the facts as a jury might have drawn, and to make such amendments in the pleadings as they might consider necessary.

*\*Lush, Q. C.*, in Hilary Term last, obtained a rule nisi accordingly.—He submitted that the ticket delivered to the plaintiff on the deposit of the article contained the terms of the contract upon which the defendants became bailees, and that the Railway and Canal Traffic Act, 1854, had no application to the case of a mere deposit of goods for safe custody. The case of *Cahill v. The London and North Western Railway Company*, 10 C. B. N. S. 154 (E. C. L. R. vol. 100),<sup>(a)</sup> was referred to.

*Collier, Q. C.*, and *Needham* showed cause.—The provision in the 7th section of the 17 & 18 Vict. c. 31, affords an answer to the rule. There could be no special contract without the signature of the party depositing the article. [WILLES, J.—This was not a contract for the carriage of goods.] The words are most general and comprehensive, "receiving, forwarding, or delivering." [WILLES, J.—"For carriage."] Further, the contract is void for unreasonableness. It professes to exempt the Company from the consequences of negligence on the part of their servants, however gross. In *McManus v. The Lancashire and Yorkshire Railway Company*, 4 Hurlst. & N. 327,† a condition that "the Company will not be responsible for any injury or damage, however caused," was held by the Exchequer Chamber to be unjust and unreasonable, and therefore void. Williams, J., in delivering the judgment of the majority of the Court, there says,—"In order to bring the defendants within the protection of the condition or special contract, it is necessary to construe it as excluding responsibility for loss occasioned not only by all risks of whatever kind directly incident to the transit, but also for that caused by the insufficiency of the carriages provided by the defendants, though \*occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the Companies are to carry on their business is a matter, generally speaking, which they and they alone, have, or ought to have, the means of fully ascertaining. And it would, we think, be not only unreasonable, but mischievous, if they were to be allowed to absolve themselves from the consequences of neglecting to perform properly that which seems naturally to belong to them as a duty. It is unreasonable that the Company should stipulate for exemption from liability for the consequence of their own negligence, however gross, or misconduct, however flagrant: and that is what the condition under consideration professes to do. The con-

(a) In error, post.

dition is therefore void." The fact of the notice having been stuck up in the office is no evidence to fix the plaintiff with knowledge of it, as in the case of a carrier, under the Carriers Act, 11 G. 4 & 1 Vict. c. 68, s. 2. And the mere fact of her taking the document in her hand with the notice printed on the back is equally unimportant. There is no contract, therefore, to bind the plaintiff by the terms of the condition. The Court cannot infer as a matter of fact that she saw it. The Company are bound by s. 2 of the 17 & 18 Vict. c. 31, to afford all reasonable facilities for "the receiving and forwarding and delivering of traffic (which by s. 1 includes passengers and their luggage) upon and from their railway:" and by s. 1 the word "railway" is declared to include every *station* belonging to the Company. The defendants, therefore, were bound to receive and take care of the article in question.

*T. Jones* (with whom was *Lush*, Q. C.), in support of the rule.—Neither the Carriers Act, 11 G. 4 & 1 W. 4, c. 68, nor the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, can have any application \*81] here. The simple \*question is, upon what terms did the plaintiff deposit her property with the Company? [BYLES, J.—Mutually understood.] If the plaintiff had the means of acquiring the knowledge of what the Company understood and intended, was she not bound to avail herself of those means? and can she now take advantage of her neglect to do so? In affording this sort of accommodation to the public, the Company are not executing any duty imposed upon them by law: and they profess to deal with all persons availing themselves of the accommodation thus afforded, only upon the footing of their not being held responsible for goods deposited with them for safe custody, if valuable. It was but reasonable that they should make some such condition, in order to protect themselves against fraudulent claims. If the plaintiff is to be taken not to have known of the limitation of the liability, her ignorance was the result of her own laches. The Company had done their duty when they put her in the way of knowing it. *Cur. adv. vult.*

ERLE, C. J.—The declaration in this case was founded on a bailment of goods to be kept safely and returned on demand. The first plea was a traverse of the deposit on those terms; and the fourth plea alleged that the deposit was made on a condition that no liability should attach to the defendants if the value of the goods exceeded 10*l*. The question now is, whether, upon the facts stated below, there was evidence on which either of those pleas ought to be found for the defendants. The plaintiff, after a journey, deposited in the cloak-room at the defendants' station a bag containing wearing apparel and also jewellery to the value of 30*l*. She knew that the bag might be depo- \*82] sited at that place, and that it was on some special \*terms; for, she paid 2*d*. and received a ticket, and presented the ticket when she demanded the bag,—which are three of the terms which the defendants profess to impose; the fourth being their exemption from liability for any package exceeding the value of 10*l*. The defendants had placed a notice in large letters at the cloak-room, which all persons resorting to it might see, if they chose to read it, and had printed the same notice on the ticket delivered to the plaintiff. She stated that she did not see the large notice; and no one asked her whether

she had read the notice on the back of the ticket. When she returned to the station, she demanded the bag; but it was not to be found. On the following day it was returned to her with all the apparel safe; but some of the jewellery was missing. If it had been in the bag, it must have been stolen. That, therefore, became an important question to be tried: and the jury on that found for the plaintiff.

Upon these facts, the defendants obtained a rule nisi to enter a verdict for them pursuant to leave reserved at the trial, on the first or the fourth issue, if the facts either showed that the deposit was not as stated in the declaration, or was as stated in the fourth plea,—the Court being at liberty to draw any inference which the jury might draw. The plaintiff, in showing cause, has contended that the deposit of the bag with the defendants brought the case within the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), s. 7, regulating the terms on which railway Companies as common carriers may make contracts in respect of the receiving, forwarding, and delivering traffic; and that the defendants had received the bag as carriers, and were absolutely liable for the safe delivery of it, because the proviso contained in that section had not been complied with. But I am of opinion that the defendants \*did not receive the bag in their capacity [83 of carriers to forward, and that the statute referred to has no application.

Then, do the facts show either that the defendants received the bag upon the terms of being bound absolutely to keep safely, and to deliver it on demand, or that the condition of exemption from liability on account of the value did not attach? My answer is in the negative. The nature of the accommodation afforded for depositing articles at the cloak-room was at the trial and must be taken now to be known, that is, that the articles are received for a small charge, and returned upon the production of the ticket given as a voucher at the time of deposit: and I take the facts to be, that the plaintiff knew that the deposit was to be made according to some terms imposed by the defendants, because she conformed to some of them, not upon inquiries then made, but as having previous knowledge; that the defendants had used all reasonable means to make known to the depositors, and among them to the plaintiff, the terms on which they received deposits; and that the plaintiff knew there were special terms, and either knew what they were, or, with the means of knowing what they were, chose to make the deposit without ascertaining them,—either assenting to them on the assumption that they were reasonable, or being willing to be bound by them whatever they might be.

From this finding it follows, I think, that the plaintiff does not prove that the deposit was made on the terms of absolute liability stated in the declaration; and that the defendants do prove that the deposit was received on special terms, and, among them, on the terms of exemption from liability if the value exceeded 10*l*. The defendants did not receive the bag as warehousemen, according to the ordinary meaning of the word; the \*rapidity of receipt and return is the [84 main purpose of the bailor. With that in view, the goods are taken in and kept ready for return at a moment; but there must be prepayment of the fee, and the return is to be made to the bearer of the ticket, and not to the owner of the goods until the ticket has been

accounted for. All this was known to the plaintiff; and these are special terms different from the terms in the declaration; and therefore the defendants, in my judgment, are entitled to succeed on the first plea.

I also think they are entitled to succeed upon the fourth plea. In the contract of bailment, the bailee may impose whatever terms he chooses, if he gives notice to the bailor that there are special terms, and the means of knowing what those terms are: and, if the bailor chooses to make the bailment, he is bound by them. In *Wyld v. Pickford*, 8 M. & W. 448,† which was an action against a carrier for non-delivery of goods, the defendants pleaded a condition for exemption from liability, and knowledge in the plaintiff, but no assent: and, on special demurrer, that the plea showed evidence of contract, and not a contract, Parke, B., gives judgment for the defendant, saying, (p. 458), that “if the plaintiff sues on a bailment to the defendants on the special terms, it must be a bailment on the terms on which alone the defendants (the bailees) have agreed to accept the goods.” In *Walker v. The York and North Midland Railway Company*, 2 Ellis & B. 750 (E. C. L. R. vol. 75), the action was against carriers for not duly carrying fish. The plea was that the fish was received on certain special terms set out therein. It appeared that the defendants had served a notice on the plaintiff of exemption from liability in respect of the carriage of fish, and that the plaintiff refused to receive the notice, and threw it on the ground: and he claimed to impose on \*85] the defendants a liability contrary to the \*terms of that notice which he so dissented from. The jury were directed that they might find that the plaintiff had assented to the terms of the defendants’ notice, if, knowing there were special terms imposed by them, he chose to make the bailment: the jury thereupon found that he had assented, and a new trial was refused. These cases were actions against carriers, where the bailment created the contract sued upon, unless the evidence showed a different contract. Here, there is no carrier’s contract; the defendants are at liberty to make any contract they please: and although, where the question is, what were the terms on which the bailment was made, the reasonableness of the terms is an irrelevant inquiry, the parties being at liberty to choose their own terms, I still beg leave to add, that, considering the nature of the accommodation, the condition appears to me to be most reasonable. If valuable goods were deposited, where so much freedom of circulation is essential, the danger from dishonesty would be great. If the action lay for 20*l.* or 30*l.* worth of jewellery, it would equally lie for any amount. On these grounds, I think, the rule should be made absolute.

WILLES, J.—I am entirely of the same opinion: and I think it quite clear that the plaintiff went down to trial not relying upon the last ground argued on her part, viz. that she did not receive notice, or was not aware of the fact that the terms of the notice constituted a binding contract between her and the Company, but that, notwithstanding that she knew there were special terms upon the ticket, she disregarded them, relying on the statute 17 & 18 Vict. c. 31, as making those terms inoperative so far as she was concerned. That was, no doubt, the question she went down to try. Now looking at the Act of

Parliament, it is clear to my mind, that, when it talks of the \*receiving, forwarding, and delivering as matters in respect of [\*86 which contracts are to be entered into, which are to be void, unless signed, it deals with the receipt, forwarding, and delivery of goods by carriers, and does not deal with such accommodation as that which is in question in this case. The accommodation given at the cloak-room of a railway station on persons arriving who do not choose to carry their sacks or their small matters in their hands about with them in town, but prefer to leave them in a convenient place whence they may have them when they call for them, is not a thing which is at all essential to or necessarily connected with the business of a carrier: and I think Mr. *Needham's* argument was not well founded, when he said that the Company are bound to afford such a convenience to persons who use the railway. I do not think, even if it was so, that the case would come within the former section of the Act, certainly not within the last section. It is entirely outside of the section. Then, if that be so, was the plaintiff bound by the terms contained in the notice? I entirely concur with what the Lord Chief Justice has said as to the plaintiff's knowledge; and I do not mean to enlarge upon it. She evidently knew there were terms on the back of the ticket, and that the ticket was part of the machinery by which she and the Company contracted, if they contracted at all: and those terms to any person of ordinary understanding would imply that the Company intended to annex conditions to the receipt of the goods. The Lord Chief Justice has observed, that, in providing for receipt and delivery, it was not intended that it should be an ordinary bailment. The existence of the terms on the ticket showed that the Company intended to annex a condition to their receipt of the goods. Assuming that the plaintiff did not read the terms of the condition, it is evident that \*she knew that they were there, and that she was satisfied [\*87 to leave her goods in the hands of the railway Company upon those terms. The obvious result of this is, that, either she must be taken to have assented to the terms, or, if she did not assent, she knew there were terms which the railway Company intended to stipulate for. Either upon the former ground, therefore, that there was no such contract, or, if there was a contract, that it was a different one from that relied upon in the declaration, I am prepared to agree with the Lord Chief Justice in giving judgment for the defendants.

BYLES, J.—I am of the same opinion. I quite agree with all that has been said by my Lord and my Brother Willes as to the non-application of the Railway Traffic Act. I confess last night I was considerably impressed by Mr. *Collier's* argument. He said there was an allegation in the plea of contract, and the evidence was that this lady had never read the terms of the ticket; and, therefore, although she put the notice into her pocket, she could not be said to have assented to such a contract. Now, suppose, instead of a notice limiting the liability of the bailees, this had been a notice to quit, or a notice of the dishonour of a bill, or a notice of objection to a vote for a county or borough,—it would be a strong thing to say that a man might put such a notice into his pocket, and say he never read it. No doubt, there is a great distinction between such notices as those and this notice. Those are notices framed upon the law, and recognised

by the law; and the mode of service pointed out by the law. This is a notice which seeks to qualify that obligation which without such a notice would arise between the bailor and the bailee. Now, where a notice of this kind is given, it seems to me there may be two sorts of assents. One is, where the terms are read by the bailor, and then he \*88] puts the document into his pocket, and so assents to it expressly. But, if, without reading it, he chooses to put it into his pocket, though he does not know one word it contains, it seems to me that he assents to it implicitly, whatever the terms may be, on two conditions. One of those conditions is, that the terms contained in the notice, should be reasonable terms. I think that is essential. Suppose such a notice as this contained a condition to the effect, that, whatever the nature or value of the goods, if the bailor does not claim them within two days, they shall belong absolutely to the railway Company,—no one could say, that, if the party put a notice of this kind into his pocket, he assented to such a stipulation as that. I think we may take it in the present case that the terms were reasonable. I do not think it is enough that they are printed; they must be not only reasonable and intelligible, but plain and obvious,—plain and obvious both in the language and in the writing or printing by which they are conveyed.

There is a case something like this, of *Butler v. Heane*, 2 Campb. 415. It is true it relates to a common carrier; and that has already been observed upon by my Lord and my Brother Willes. This is not the case of a common carrier, but rather that of a warehouseman; but still the principle is the same. That was an action against a common carrier for the loss of a trunk. The trunk was delivered to the carrier at Cheltenham, and at Cheltenham the only mode taken to publish the limitation of the carrier's liability was, by a notice stating in large print the many advantages belonging to the wagon of the defendant, and, in very small characters at the bottom, that the carrier would not be answerable for goods above the value of 5*l*. unless entered as such and paid for accordingly. Lord Ellenborough says,—“This is not enough to limit the \*89] defendant's common law liability. We have not sufficient evidence of any special contract. The jury ought to believe, that, at the time when the trunk was delivered at the wagon-office at Cheltenham, the plaintiff or his agent there saw, or had *ample means* of seeing, the terms on which the defendant carries on his business. How can this be gathered from the hand-bill nailed on the door, which called the attention to everything that was attractive, and concealed what was calculated to repel customers?” Now, that I think is a case founded upon sound reason, and that shows that the limitation of the liability must be plain and obvious. The question is whether there is anything here unreasonable; and I agree with what my Lord has said upon that subject, viz., that the stipulations are most reasonable. Are they plainly and obviously written? I could wish, I must confess, that the printing had been upon the face rather than upon the back of the ticket. But, as was observed by Mr. *Jones*, a person can hardly put it into his pocket or take it out of his pocket without seeing there is something printed upon the back of it. That being so, and the limitation being plainly expressed, I think there was a plain

and obvious notice, and an implicit assent, which may constitute a contract. Further, it is to be borne in mind that there was another notice printed in large characters and stuck up in or about the office. Taking all these circumstances together, I think it is a case in which there may be an implicit contract to accept the terms of the notice whatever they were. That being so, I agree with my Lord, that, even upon the pleadings as they stand, the defendants are entitled to the judgment of the Court.

KEATING, J.—I also am of opinion that the defendants are entitled to the judgment of the Court. They seek \*to discharge themselves from liability, upon the ground that the parcel delivered [90 to them to be kept by them for the plaintiff exceeded the value of 10*l*, and that they therefore incurred no liability whatever, even although the loss might have been incurred through their negligence. It appears to me that the contract is a stringent one; but I am not at all prepared to say it is unreasonable. It was incumbent upon the Company to show that such was the contract between them and the defendants. Now, have they proved that? I think they have. The circumstances which my Lord has adverted to in his judgment do, I think, sufficiently show that the plaintiff knew and assented to the terms upon which the Company were willing to contract; and there is no evidence to controvert it. I certainly was struck by the statement that the plaintiff positively swore that she knew nothing about the printed condition at the back of the ticket. That, however, turns out to be a mistake, and there was no such evidence given with reference to the ticket which was delivered to her. Is there, then, anything to repel the ordinary presumption that would arise from the party knowing that there were special terms connected with the bailment, and receiving a ticket on which those terms are printed in legible characters? It seems to me there is not. I therefore think there was evidence that the plaintiff assented to those terms; and upon that ground I think the defendants are entitled to the judgment of the Court.

Rule absolute.

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\*BAILEY v. STEPHENS. *May 2.*

[91

A claim of a prescriptive right in the owners or occupiers of close A. to enter close B. (belonging to a third person), and to cut down and carry away and convert to their own use all the trees and wood growing and being thereon, "as to the said close A. appertaining," is void, as being too large.

THE first count of the declaration stated that the defendant, on the 1st of November, 1861, and on divers other days and times between that day and the commencement of the suit, broke and entered a certain close of land of the plaintiff called Short Cliffe Wood, enclosed by a hedge-fence, and bounded on the north-west by other lands of the plaintiff, and on the south-east by lands in the occupation of one James Emery, situate in the parish of Blagdon, in the county of Somerset; and that the defendant then felled, cut down, prostrated, and destroyed two trees of the plaintiff in the said close called Short Cliffe Wood there then standing and growing, and took and carried away the same and converted and disposed thereof to his own use.

There was also a count for money lent, money paid, money had and received, and money found due upon accounts stated.

The defendants pleaded,—first (to the first count) not guilty,—secondly, that the said close and trees were not respectively the close and trees of the plaintiff.

Third plea,—that, at the time of the alleged trespass, William York was seised in his demesne as of fee of and in a certain close called Bloody Field, immediately adjoining the said close of the plaintiff, and that the said William York and all those whose estate he had, and his and their tenants, had *from time whereof the memory of man runneth not to the contrary* enjoyed the right, at their free will and pleasure, to enter by themselves and their servants upon a part or \*92] strip, to wit, a lugfall, (a) of the said close of the plaintiff, \*adjoining the said close of the said William York, for the purpose of cutting down and carrying away, and to cut down and carry away and convert to his and their own use the trees and wood growing and being on the said strip or lugfall, as to the said close of the said William York appertaining: and that the said William York before the alleged trespass demised the said Bloody Field, with its appurtenances, to James Emery, for a term of years not yet expired, who entered into possession of the same, and was before and at the time of the alleged trespass in possession thereof under the said demise as tenant thereof to the said William York; and that the said trees in the declaration mentioned were growing and being on the said strip or lugfall, and that the alleged trespass was committed by the defendant as the servant and by the authority of the said James Emery, and on his behalf, on the said strip or lugfall, and not elsewhere in the said close of the plaintiff, in the exercise of the said right, and was a user by the said James Emery of the said right.

Fourth plea,—that the said James Emery, at the time of the alleged trespass, was possessed of the said land called Bloody Field immediately adjoining the said close of the plaintiff as aforesaid, and that the occupiers thereof for *sixty years* before this suit enjoyed, as of right, and without interruption, the right to enter at their free will and pleasure, by themselves and their servants, into a part or strip, to wit, a lugfall, of the said close of the plaintiff, next adjoining the said land of the said James Emery, for the purpose of cutting down and carrying away, and to cut down and carry away and convert to their own use, the trees and wood growing and being in the said strip or lugfall, as to the said land of the said James Emery appertaining; that the said trees in the declaration mentioned were growing and being on \*93] the said strip or lugfall; and \*that the said trespass was committed by the defendant as the servant and by the authority of the said James Emery, and on his behalf, in the said strip or lugfall, and not elsewhere in the said close of the plaintiff, in the exercise of the said last-named right, and was a user by the said James Emery of the said right.

Fifth plea,—that the said James Emery, at the time of the alleged trespass, was possessed of the said land called Bloody Field immediately adjoining the said close of the plaintiff as aforesaid, and that the occupiers thereof for *thirty years* before this suit enjoyed as of right

(a) A perch.

and without interruption the right to enter at their free will and pleasure, by themselves and their servants, into a part or strip, to wit, a lugfall, of the said close of the plaintiff, next adjoining the said land of the said James Emery, for the purpose of cutting down and carrying away, and to cut down and carry away and convert to their own use, the trees and wood growing and being in the said strip or lugfall, as to the said land called Bloody Field appertaining; that the said trees in the declaration mentioned were growing and being in the said strip or lugfall; and that the said alleged trespass was committed by the defendant as the servant and by the authority of the said James Emery, and on his behalf, in the said strip or lugfall, and not elsewhere in the said close of the plaintiff, in the exercise of the last-named right, and as a user by the said James Emery of the said right.

Sixth plea,—that, at the time of the alleged trespass, the said William York was seised in his demesne as of fee of and in the said close of land called Bloody Field, immediately adjoining the said close of the plaintiff as aforesaid, and long before the time of the alleged trespass, by a deed made between the then owner of the said close now of the plaintiff, and which said owner was then seised thereof in fee, and the then owner of \*the said land called Bloody Field, who was then seised in fee of the said last-named [\*94 land, and whose estate therein the said William York at the time of the said alleged trespass had (but which deed had been lost or destroyed by accident), the said then owner of the close now of the plaintiff granted to the said then owner of the said land called Bloody Field, his heirs and assigns, the right for himself and themselves, and his and their tenants, occupiers of the said land for the time being, at their free will and pleasure, by themselves and their servants, to enter upon a certain strip of the said close of the plaintiff, next adjoining the said close called Bloody Field, to wit, a lugfall of the said close of the plaintiff, measured from the boundary of the said two closes, for the purpose of cutting down and carrying away, and to cut down, carry away, and convert to his and their own use, the trees and wood growing and being in the said strip or lugfall, as to the said close called Bloody Field appertaining; that the said James Emery was at the time of the alleged trespass tenant to the said William York of the said close called Bloody Field, and as such tenant, and by virtue of the said grant, was entitled to the right, at his free will and pleasure, by himself and his servants, of entering into the said strip or lugfall for the purpose aforesaid, and of cutting down, carrying away, and converting to his own use the trees and wood growing and being in the said strip or lugfall; that the said trees in the declaration mentioned were growing and being in the said strip or lugfall; and that the said trespass was committed by the defendant as the servant and by the authority of the said James Emery, and on his behalf, in the said strip or lugfall, and not elsewhere in the said close of the plaintiff, in the exercise of the said last-named right, and was a user by the said James Emery of the said right.

\*Seventh plea, to the residue of the declaration, never indebted. [\*95

The plaintiff demurred to the third, fourth, fifth, and sixth pleas,

the ground of demurrer stated in the margin being, "that the plea shows no defence to the action, and claims too large a right." Joinder.

*Montague Smith, Q. C.* (with whom was *Barstow*), in support of the demurrer.(a)—The claim is too large: to be valid, it must be connected with the enjoyment of the estate, and must be measured by that enjoyment. In *Clayton v. Corby*, 5 Q. B. 415 (E. C. L. R. vol. 48), 2 Gale & D. 174, in trespass for breaking the plaintiff's close and digging and carrying away clay, the defendant justified as owner of a brick-kiln, and pleaded that all occupiers thereof, for thirty years, had enjoyed, as of right, &c., a right to dig, take, and carry away from the close so much clay as was at any time required by him and them for making bricks at the brick-kiln, in every year, and at all times of the year: and it was held that the claim was unreasonable and bad. [BYLES, J.—That depended entirely upon the Prescription Act, 2 & 3 W. 4, c. 71; and the Court declined to take any notice of the word "grant." \*96] What you have to show \*here, is, that this could not be the subject of a grant.] The 1st section of the Prescription Act enacts that "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any lands," except, &c., "shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years." Lord Denman, in giving the judgment of the Court in *Clayton v. Corby*, says: "It is observable that, in all cases of a claim of right in alieno solo, whether immediately or in any degree resembling the present, such claim, in order to be valid, must be made with some limitation and restriction. In the ordinary case of common appurtenant, the right cannot be claimed for commonable cattle without stint, and to any number; but such right is measured by the capacity of the tenement in question to maintain the cattle during the winter; levancy and couchancy must be averred and proved. Again, in the case of common of estovers, or a liberty of taking wood, called in the books house-bote, plough-bote, and hay-bote, such liberty is not wholly vague and indeterminate, but confined to some certain and definite use. The like of the common of piscary. The nature of these rights is thus compendiously, but, we believe, accurately, given by Mr. Justice Blackstone, 2 Comm. 35,—'These several species of commons do all originally result from the same necessity as common of pasture, viz. for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That a claim of right in alieno solo of the kind in the defendant's plea mentioned, should, in order to be valid, be made with some limitation or restriction, and not in the unlimited and unrestricted manner in the pleas mentioned:

"2. That a grant of trees and wood growing on land, and of trees and wood thereafter to grow, would be bad, therefore the pleas are bad:

"3. That the defendant in his pleas claims more than an incorporeal right, to which alone the alleged grants in the pleas mentioned entitled him; and that he claims rights of too extensive a nature to be valid."

of the tenant's family; common of turbary and fire-bote for his fuel; \*and house-bote, plough-bote, carte-bote, and hedge-bote, for [\*97 repairing his house, his instruments of tillage, and the necessary fences of his grounds,—that is, for a certain and definite purpose." Here, the plea is altogether deficient in this requisite. In the Attorney-General v. Mathias, 27 Law J., Ch. 761, it was held that a profit à prendre in another man's soil cannot be claimed by custom, however ancient, uniform, and clear the exercise of that custom may be; and that a right to carry away the soil of another, without stint, cannot be claimed by prescription. Byles, J., in delivering the opinion of the Court, there says; "A prescription, to be good, must be both reasonable and certain; Com. Dig. *Prescription* (E. 3), (E. 4); and this alleged prescription seems to me to be neither. Thus, a claim of a common without stint annexed to a messuage without land is bad: *Benson v. Chester*, 8 T. R. 396. Lord Coke says,—Co. Litt. 122 a,—that you must not exclude the owner of the soil. And in *Clayton v. Corby*, 5 Q. B. 415 (E. C. L. R. vol. 48), 2 Gale & D. 174, although a jury had found a thirty years' exercise without interruption, as of right, of a claim by prescription to dig clay in the plaintiff's land for the defendant's brick-kiln, and though the verdict could not be assailed, yet the Court of Queen's Bench gave judgment for the plaintiff non obstante veredicto, on the ground that such a prescription was radically vicious, and incapable of being sustained, for that it was an indefinite claim to take all the clay; in other words to take the whole close. That case rests on the soundest rules of law, and it is an authority expressly in point, showing that the strongest evidence of user could not support this as a prescriptive claim." In *Ackroyd v. Smith*, 10 C. B. 164 (E. C. L. R. vol. 70), in trespass quare clausum fregit, the defendants justified under a supposed right of way conveyed to them by A. The plea, after stating the conveyance to A. of "a certain close, \*and certain plots, pieces, or parcels of land, &c., together [\*98 with all ways, &c., particularly the right and privilege to and for the owners and occupiers of the premises conveyed, and all persons having occasion to resort thereto, of passing and repassing, for all purposes, in, over, along, and through a certain road," &c., alleged an assignment by A. to the defendants of the said lands, tenements, hereditaments, premises, and appurtenances granted by the former deed; and then averred that the trespasses complained of were committed by the defendants, being owners of the said lands, &c., and in the possession and occupation thereof, in using the right of way for their own purposes. The plaintiffs, after setting out the deed upon oyer, demurred specially to the plea, on the grounds that the defendants claimed a more extensive right than that granted by the deed, and that, if the right as claimed was granted by the deed, was not assignable. In delivering the judgment of the Court, Cresswell, J. (p. 187), says: "If the right conferred by the deed set out, was only to use the road in question for purposes connected with the occupation and enjoyment of the land conveyed, it does not justify the acts confessed by the plea. But, if the grant was more ample, and extended to using the road for purposes unconnected with the enjoyment of the land,—and this, we think, is the true construction of it,—it becomes necessary to decide whether the assignee of the land and appurte-

nances would be entitled to it. In the case of *Keppell v. Bailey*, 2 Mylne & K. 517, the subject of covenants running with the land was fully considered by Lord Chancellor Brougham; and the leading cases on it are collected in his judgment. He there says (p. 537),—‘The covenant (that is, such as will run with the land) must be of such a nature as *‘to inhere in the land,’* to use the language of some cases; \*99] or, ‘it must concern \*the demised premises, and the mode of occupying them,’ as it is laid down in others: ‘it must be quodammodo annexed and appurtenant to them,’ as one authority has it; or, as another says, ‘it must both concern the thing demised, and tend to support it, and support the reversioner’s estate.’ Now, the privilege or right in question does not inhere in the land, does not concern the premises conveyed or the mode of occupying them: it is not appurtenant to them. A covenant, therefore, that such a right should be enjoyed, would not run with the land. Upon the same principle, it appears to us that such a right, unconnected with the enjoyment or occupation of the land, cannot be annexed as an incident to it: nor can a way appended to a house or land be granted away, or made in gross; for, no one can have such a way but he who has the land to which it is appendant: Bro. Abr. *Graunt*, pl. 130.(a) If a way be granted in gross, it is personal only, and cannot be assigned. So, common in gross sans nombre may be granted, but cannot be granted over: per Treby, C. J., in *Weekly v. Wildman*, 1 Lord Raym. 407. It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it: nor can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of an assignee.” That goes even further than is necessary for the present purpose. In Co. Litt. 4 b, it is said: “A man seised of divers acres of wood grants to another omnes boscos suos, all his woods; not only the woods growing upon the land passe, but the land itselfe, and by the same name shall be recovered in a præcipe; for, boscos does not onely include the trees, but the land also whereupon they grow. The same law if a man in that case grant \*100] omnes boscos suos crescentes, &c., yet \*the land itself shall passe, as it hath been adjudged.” And see *Doe d. Kinglake v. Beviss*, 7 C. B. 456, 485 (E. C. L. R. vol. 62).

*Prideaux, contrà.*(b)—The pleas are based upon a special agreement between the former owners of the respective closes, in derogation of the rights of the owner of the servient tenement. The policy of the law is, to uphold such special agreements, unless there is something in them which is contrary to public policy: and the onus probandi is cast upon the party who relies on an invalidity arising upon that ground. In Cruise’s Digest, Vol. III., Title xxxi., *Prescription*, Ch. 1, § 11, it is said: “A prescription by immemorial usage can in general only be for things which may be created by grant: for, the law allows prescriptions only to supply the loss of a grant. Antient

(a) Citing M. 5 H. 7, fo. 7, pl. 15.

(b) The points marked for argument on the part of the defendant were as follows:—

“That the pleas demurred to show a good defence respectively; that the rights claimed are not too large, that they may have had a legal origin, that they may lawfully have been the subject of special grant and agreement, may lawfully be claimed by prescription, and are rights of profit or benefit to be taken and enjoyed from land, within the true meaning of the statute 2 & 3 W. 4, c. 71.

grants must often be lost; and it would be hard that no title could be made to things lying in grant, but by showing the grant.(a) Upon immemorial usage, therefore, the law will presume a grant, and a lawful beginning, and allows such usage for a good title: but still it is only to supply the loss of a grant.(b) Therefore, for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed, that can be supposed, a prescription is not good." In *Dowglas v. \*Kendal*, Cro. Jac. 256, to trespass for taking and carrying away [the plaintiff's thorns, the defendant justified, "because the place where, &c., is an acre, and that he is seised in fee of a messuage and three acres of land in Chippingwarden aforesaid, and that he and all whose estate it was, &c., have used from time to time to cut down and take omnes spinas crescentes upon the said place;" and the justification was sustained. [ERLE, C. J.—The claim was "to expend in the said house, or about the said lands, as pertaining to the said house and lands."]] That, though a necessary allegation where the claim is of a right of common, is not so where the party claims the entire right. If a man may prescribe for all the thorns growing upon a particular close, it is difficult to see why he should not also prescribe for timber. In *Stanley v. White*, 14 East 332, to an action of trespass for cutting down and converting trees, which the defendant justified as growing upon his land and freehold, the plaintiff replied that the trees were his freehold, and not the freehold of the defendant: and this was held to be proved by showing that they grew on a certain woody belt fifteen feet wide, which surrounded the plaintiff's land, but was undivided by any fences from the several closes adjoining, of which it formed part, belonging to different owners; and that from time to time the plaintiff and his ancestors, at their pleasure, cut down for their own use the trees growing within the belt, and that the several owners of the different closes enclosing the belt never felled trees there, though they felled them in other parts of the same closes, and that, when they made sale of their estates, the trees in the belt were never valued by their agents, because they were reputed and considered to belong to the plaintiff and his ancestors, in which the several owners acquiesced. Lord Ellenborough, in giving judgment, said: "The presumption from the evidence is, that all the land of the belt belonged originally to the same person, and that, when he granted it out to others, he reserved the right to the trees then growing or thereafter to grow in the soil: and he and those claiming under him prove their right by exercising acts of ownership in cutting and taking away the trees from time to time, as occasion requires, in different parts of the belt. It is evidence of one reserved right in the original grantor, and not of different rights created by different conveyances. The soil of the whole was probably granted out entire in the first instance, reserving the trees; and the original grantee may have afterwards granted it out in divided portions to different persons. Whatever title is consistent with the established course of enjoyment may be proved by such enjoyment: and here was evidence of a right such as I have stated, and there is no evidence of any ad-

(a) *Potter v. Sir Henry North*, 1 Vent. 387.(b) *Gibson v. Clark*, 1 Jac. & W. 159.

verse right." It was then suggested, that, though this might be evidence for the plaintiff of his having an interest in the trees, it was no evidence of a *freehold* in them, as claimed by him in his replication; that one might have a right to trees as a profit à prendre in another's soil, without having a freehold in the trees; and that it was difficult to say how one could have a freehold in the trees growing in another's soil, and that here the plaintiff did not claim the soil itself. But Lord Ellenborough observed "that the plaintiff may not have claimed the whole that he was entitled to; and that perhaps the right to the land itself might be put in hazard, if the defendant could succeed in showing that the plaintiff could have no freehold interest in the trees apart from the soil. But, even if that were so, perhaps a reservation of the trees then growing or thereafter to grow in the soil might be taken to reserve so much of the soil as was necessary for the growth and sustentation of the trees." \*103] [ERLE, C. J.—The claim there was not like this, a claim by the occupier of adjoining land to go upon another man's freehold to take trees.] In Sir Francis Barrington's Case (*Chalke v. Peter*), 8 Co. Rep. 136 b, the facts were these:—Sir Robert Rich, Lord Rich, was seized of the forest or chace of Hatfield (whereof the place where, &c., was parcel) in fee, and by his deed indented, bearing date the 30th of January, 19 Eliz., for good consideration, granted to Sir Thomas Barrington, Knt., and his heirs, omnes boscos arbores tam manem' subboscos et spinas quam alia genera quorum, cunque ad tunc crescent' stant' et existent', simul cum omnibus arboribus vocat' timber-trees, boscis, subboscis, et spinis quibuscunque, quæ ad adiquod tempus extunc imposterum forent' crescent', stant', renovant', sive existent' in et super illis partibus forestæ præd', communiter vocat' Bushend quarter, et quarterium vocat' Takely quarter (except the land and soil of the same wood), with liberty to enclose them, and to hold them enclosed for the preservation of the spring of wood, which should be for such time as by the laws and statutes of the realm is appointed and enacted, and not otherwise, absque molestatione seu interruptione of the said Lord Rich, his heirs or assigns, and to exclude the deer and all other cattle out of the wood so enclosed, and to have the herbage and feeding thereof, as any owner of the wood might do by the laws and statutes of this realm, without interruption of the said Lord Rich, his heirs or assigns. It was resolved "that Sir Francis Barrington has an inheritance as profit appendre in alieno solo, and that the soil remains to the Lord Rich." [BYLES, J.—That was a grant to Sir Francis Barrington and his heirs in gross. ERLE, C. J.—It certainly is an odd sort of estate,—a fee-simple in a profit à prendre.] If a right to cut trees in another man's soil can be granted, these pleas are sustained. \*104] [Liford's Case, 11 Co. Rep. 46 b, recognizes this, that, according to the terms of the grant, you may or may not give a fee. Lord Coke says: "This difference may be collected out of *Ive's Case*, in the fifth part of my Reports, fo. 11. Vide 14 Hen. 8, fo. 1, a, b. If I by deed grant all my trees within my manor of G. to one and his heirs, the grantee shall have an inheritance in them, without any livery and seisin. Vide Sir Francis Barrington's Case, in the 8th part of my Reports, fo. 137. And in a præcipe brought against lessee for life, where the trees are excepted, you need not in

such case except the trees, because no præcipe lies of them, but they shall be recovered by him who has right paramount by the recovery of the land." A grant of all saleable woods growing was held not to pass the soil: *Pincomb v. Thomas*, Cro. Jac. 524. As to the other point,—in *Hoskins v. Robins*, 2 Wms. Saund. 323, in replevin, the defendants made cognisance as bailiffs of the lords of the manor of Blisland, as damage feasant: the plaintiff pleaded in bar, that, within the said manor of Blisland, there are, and from time whereof, &c., were, divers customary tenements parcel of the said manor, and demised and demisable by copy of Court roll of the said manor, at the will of the lord, according to the custom of the said manor; and that, within the said manor, there is, and from time whereof, &c., there was, a custom that all the customary tenants of the customary tenements of the said manor "have had, and have used and been accustomed to have, the sole and several pasture in the said places in which, &c., yearly and every year, for the whole year, at their will and pleasure, as belonging to their said customary tenements." After verdict for the plaintiff, it was moved in arrest of judgment,—First, that it is not shown what estate the copyholders mentioned in the plea had in their customary tenements \*to which they claimed the sole and several pasture. [\*105 Secondly, the custom is not good to exclude the lord for the whole year, and cannot have a good commencement; for, though the lord may grant it by deed to one or more freeholders, and therefore they may prescribe if the grant was before time of memory, yet he cannot grant it to his own customary tenants, on account of the debility of their estate, especially if they are only estates for life or years, as, for anything that appears to the contrary, they are. And, although it be true that by custom copyholders may have common in their lord's soil, because it is to be intended that it was with the permission of the lord at first for the better improvement of their copyhold estates, and the lord might very well spare such common, because he had enough besides for his own cattle, and by such constant usage it has at last arisen into a custom; yet there was not the same reason here, because no usage with the permission of the lord at first can wholly exclude the lord himself *nolens volens*, and vest all the interest in the copyholders, who at first were bare tenants at will to the lord. Thirdly, that it is not alleged that the copyholders have the sole pasture for their cattle *levant and couchant on their tenements*, for otherwise they cannot appropriate it to their tenements: and he cited *Noy's Rep.* 145, *Jefferys and Boyd's case*, where one prescribed for common appurtenant to land, and did not say for cattle *levant and couchant*, and therefore it was held ill. *Saunders*, for the plaintiff, as to the first exception, answered that it was not material to show what estate the copyholders have in their several customary tenements; because, be their several estates either in fee, or for life, or years, yet the custom hath annexed this sole pasture as a profit a prendre or perquisite to their estates for the time \*being; and they claim it by the custom of the manor, and not by prescription, for, they cannot prescribe at all against [\*106 their own lord, nor against any other but only in the name of their lord: but it is otherwise with respect to any tenants of *freehold estates* at the common law, for, if they claim any such benefit, they must show their estates, and prescribe in the name of the tenant in fee by a *que estate*:

but here the tenants by copy claim only by the custom, and, for the reason before mentioned, it is not necessary for them to show their estates in certain. And, as to the second exception, he said that the custom was good, and might have had a reasonable beginning: and that it was good he cited the case of *Pitt v. Chick*, Hutton 45, where it is adjudged that one may *prescribe* for the sole feeding, because it might have commenced by *grant*; and then, if it may be pleaded by *prescription* in this case, it may be good by *custom*; and such custom might commence at first by the voluntary agreement of the lord with his copyhold tenants that they should have the sole pasture, to induce them to hold their customary estates, which then were only bare estates at will, and to bestow their pains and labour in improvement, as well for the benefit of the lord himself, as for their own proper advantage; and so a continued usage has now made a custom, for the same reason that it has now fixed the estates of copyholders and made them permanent, and enabled the copyhold tenants to maintain an action against the lord, if he puts them out of their copyhold tenements against the custom, though their estates originally were merely at the will of the lord. As to the third exception, he answered that true it is that a man who claims only *common appurtenant* to his land ought to say for his cattle *levant and couchant*, or otherwise his prescription is not good; because in that case he claims but part of the

\*107] herbage, and the rest the lord is to have, and therefore the commoner ought to say for his cattle *levant and couchant*, for that is the standard or meteward of the profit he is to have; that is to say, grass for all his cattle *levant and couchant* on his land, and no others; and therefore, if he puts in any cattle which are not *levant and couchant*, he does a wrong to the lord, and shall be punished as a trespasser for them. But it is otherwise here, for, the copyholders here claim *all the herbage*, and wholly exclude the lord; therefore it is not material whether all the grass is depastured by cattle *levant and couchant*, or any others, for there is no more mischief or wrong to the lord in one case than in the other. And the Court overruled all these exceptions, for the reasons of *Saunders*; so that the plea in bar was upheld. It is submitted, therefore, that it is established by the authorities above cited,—first, that the right here claimed is not unreasonable in point of law; and, secondly, that it may pass by a grant. [ERLE, C. J.—*Pitt v. Chick* is the case of a grant to Pitt and his heirs in gross: that case, therefore, falls within Sir Francis Barrington's case.] In *Day v. Spooner*, 1 Rol. Abr. 402, pl. 3, Cro. Car. 432, Sir W. Jones 375, it was held, that, if A. and all those whose estate he has in the manor of D., have had from time immemorial a fold-course, that is, common of pasture for any number of sheep not exceeding 300 in a certain field, as appurtenant to the manor, he may grant over to another this fold-course, and so make it in gross; because the common is for a certain number, and by the prescription the sheep are not to be *levant and couchant* on the manor, but it is a common for so many sheep appurtenant to the manor, which may be severed from the manor, as well as an advowson, without any prejudice to the owner of the land where the common is to be taken. [ERLE, C. J.—It does not

\*108] follow that he may grant it to the occupier of Black Acre.] The case of *Hoskins v. Robins* is recognised in *Jones v. Richard*,

5 Ad. & E. 413 (E. C. L. R. vol. 31), 1 Nev. & P. 477, 6 Ad. & E. 580. One may very well imagine a good reason for such a grant as this,—the owner of the dominant tenement may have been entitled to house-bote, plough-bote, or hedge-bote over the whole of the land.

*Smith*, in reply, was stopped by the Court.

ERLE, C. J.—We are much obliged to Mr. *Prideaux* for the assistance he has afforded us; but, after giving the best attention I could to his able argument, I come to the conclusion that the pleas are bad, and therefore that our judgment must be for the plaintiff. The pleas set up a right in the occupiers of the close of the defendant to go upon the close of the plaintiff and to take all the wood that shall be growing there. It is a claim, therefore, of a right appurtenant to the land of the defendant, to take all the profits of the land of the plaintiff, wholly unconnected with the defendant's land; and to take that as passing with the estate of the defendant. Now, all the diligence and all the learning that Mr. *Prideaux* has brought to bear upon the matter have failed to enable him to produce any authority for such a right as that which the defendant here claims. The case of *Douglas v. Kendal*, Cro. Jac. 256, was a prescription for the owner of an estate to take, as appurtenant to that estate, all the thorns that should grow upon the land of the plaintiff, to be used at the house and in the tenement of the defendant; and it falls within a class of cases perfectly well known to the law, that the owner of an estate may claim, as appurtenant to that estate, a profit to be taken in the land of another, to be used upon the land of the party claiming the profit. But that does not bear upon the \*present case, because this is a claim by the owners or occupiers of the defendant's close to cut down the trees on the plaintiff's [\*109 land, and to sell and dispose of them at pleasure, wholly irrespective of the land of the defendant. Mr. *Prideaux* has further cited the case of *Sir Francis Barrington*, 8 Co. Rep. 136, *Liford's Case*, 11 Co. Rep. 46 b, and several other cases, which show that the owner of land may grant to a man and his heirs the right to take, for instance, all the wood or all the grass that shall grow upon the land of the grantor. That would be what we call a grant in gross passing to him and his heirs; and it may be construed to mean all the land or all the pasture, that is, the surface of the land; or it may be construed to be a profit *a prendre*,—a profit taken out of the land, and lying in grant. All the cases to which our attention was drawn as supporting the defendant's argument have been cases where the grant is in gross, to a man and his heirs, and not to a man and all who may thereafter occupy a certain close. That class of cases, therefore, can have no bearing on this. The case of *Hoskins v. Robins*, 2 Wms. Saund. 323, has been much pressed. There, there was a prescription very nearly to the effect of that claimed here: but I think the distinction which I pointed out in the course of the argument was one that is fully justified by our law; it was a claim to have the pasture by one of the customary tenants of a manor against the lord of the manor. There are many rights well known in manors, and capable of being supported, which arise entirely out of and are dependent upon the peculiar relation between the lord and the copyholder: but the analogy cannot be borne out between those cases and a case like this. All cases of grants are supposed to pass between the tenant in fee simple of the servient

\*110] tenement and the tenant in \*fee simple of the dominant tenement, wholly irrespective of the rights of any other. The case of *Stanley v. White*, 14 East 332, and other cases stand upon the reservation of a right,—the reservation of a right (construed to be a reservation of the land itself) in the trees. It is a claim of the land, not a claim, as this is prescribed, of a right as appurtenant to the estate, and yet wholly unconnected with the estate; a right to take all the growth of a certain kind upon the land. I cannot find any authority for such a claim. The case of *Ackroyd v. Smith*, 10 C. B. 164 (E. C. L. R. vol. 70), cited for the plaintiff, is strong to show that the owner of the dominant tenement cannot claim, as appurtenant to that tenement, a profit wholly unconnected with the enjoyment of the right of property in the dominant tenement. I therefore think the claim set up upon the present occasion is not supported by any authority, and that our judgment must be against the defendant.

WILLES, J.—I am of the same opinion. With reference to the first plea, which sets up a prescriptive right, it amounts to this, that, before the time of legal memory, some one made a grant to some one else, whereby the occupiers of the defendant's close for the time being, ad infinitum, were to be entitled to cut all the trees growing in the close of which the plaintiff was in possession at the time the trespass was committed. The simple answer to that, is, that it is not an incident which can be annexed by law to the ownership, much less to the occupation of the land. I wish to guard myself against being supposed to deny that there may be a grant by A. to B. of the right to enter and cut trees in a given close, analogous to that which one has seen in mining setts, of the right to enter and to work mines within a given area, and to take away the minerals there found,—a grant of a \*111] right to work and \*take minerals, unaccompanied by a grant of the mines themselves. I also wish to guard myself against being supposed to say that the interest in either of those grants cannot be assigned over, so that the assignee could not exercise it against the original grantor. It is unnecessary to express any opinion upon that. But, for all these positions, when it may become necessary to decide them, it may be well to refer to the case of *Muskett v. Hill*, 5 N. C. 694 (E. C. L. R. vol. 35), 7 Scott 855, where it was held that a license to search for and raise minerals and also to carry them away and convert them to the licensee's own use, passes an interest which is capable of being assigned. In the judgment in that very important case, which appears to have received great consideration, a passage is cited from *Vaughan's Reports* (*Thomas v. Sorrel*, *Vaughan* 351), where it is said "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful; as, a license to go beyond the seas, to hunt in a man's park, to come into his house,—are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use; are *licenses* as to the acts of hunting and cutting down, but, as to the carrying away the deer killed and tree cut down, they are *grants*." And, that such a grant to a man and his assigns carries an interest which is assignable, appears from the cases

which are referred to in that judgment. But, assuming such grants have been made, I apprehend it is clear they can only be made in gross. They convey an interest to the grantees, which grantees, if they wish to convey, must convey by the ordinary conveyances known to the law: and it is not because the \*grantee may happen to be the owner of the close at the time at which the grant is made to him, that such a conveyance may be dispensed with in favour of the person who may from time to time thereafter become the owner of the freehold of the close, or take the license of the owner of the freehold in the close. And the reason is a simple one, and it will be found in that class of cases now not often referred to, because the law depends principally upon the statute of Henry the Eighth. I mean the case of a conveyance by which a certain incident is granted which, though beneficial to the grantee of the land so long as he remains the owner of it, and beneficial in respect of his ownership of the land, can be of no benefit to any other person. And the authorities are to this effect, that, at common law, a benefit of that description went into whosoever hands the land might pass. The exception was the case of landlord and tenant, where the benefit runs, but, in the case of the freehold interest, the benefit only runs and the burden does not,—a distinction which has been overlooked at least on one occasion. But, in order to enable the assignee of the land to take advantage of such a benefit, it must be a benefit falling within the definition I have given,—a definition frequently given with reference to the question whether a covenant runs with a reservation in cases arising under the statute of Henry the Eighth, whether it was beneficial to the land and beneficial in respect of the ownership of the land, and not beneficial to any other person. Probably a further limit may be put, namely, whether the incident was an incident of the ordinary and usual kind. With these limits, there is no doubt the benefit granted to the owner in fee of the land might pass to the owner in fee who succeeds him, either by inheritance or by grant. The occupier might well plead by way of prescription such a right, because it \*might have been acquired by grant; but, in respect of a matter that does not fall within that description, it is perfectly clear it cannot be made appurtenant; and, if it cannot be made appurtenant, you cannot of course prescribe a claim in respect of it, but must claim by showing there has been a conveyance of the right. This plea does not show any conveyance of the right to him, but simply shows that the tenant or occupier has the surface of the land to which it is alleged to be annexed. The law on this subject is adverted to, I observe, in the 3d edition of Gale on Easements, in the notes in pp. 10–13; and also in the case of *Welcome v. Upton*, 6 M. & W. 536,† where the question arose whether the Prescription Act does or does not apply to a case of easement in gross. There is no doubt an easement in gross could not be claimed by an occupier under the Prescription Act, because under the Prescription Act, as has been pointed out already, the claim is by custom, prescription, or grant; and there is no doubt that a right could not be acquired under that Act, by twenty, thirty, or sixty years' enjoyment, according as it might be, whether an easement or a profit a prendre, except it was capable of being annexed to land within the rule I have mentioned.

But the question has arisen whether it is not possible to plead a right in gross in the manner pointed out by the subsequent section, not a section giving the right, but a section giving the mode of pleading. It is perfectly clear to my mind, that it cannot be so pleaded without showing something more than that the person is in possession as occupier; it must be shown that he is heir or assignee of the person to whom the right in gross has been granted. The mere fact of his being in possession does not show that. Therefore, notwithstanding the learned discussions that have taken place as to whether the right of an easement in gross may be pleaded in the form given \*114] under the Prescription Act, it is quite clear to my mind that nothing has passed affecting the right of prescription, and the fourth and fifth pleas are invalid. With respect to the sixth plea, that falls under the same principle as the third. It speaks of an express grant, and the third plea speaks of prescription. The result is that an absurdity and an anomaly in the law is excluded by this judgment. Can any one conceive anything more absurd than that B. should purchase from A. in 1800 the right to all the trees in Black Acre, and that there should have been put into the conveyance these words, for the sake of caution, "heirs, assigns, and occupiers or tenants of A.," then in the year 1862, A. should let his close of White Acre to a tenant from year to year, and that tenant should be allowed to grant to his successor any title to cut down the trees which had been purchased by B. of his ancestors by a distinct conveyance of which he might have had no notice whatsoever? I think all the pleas are bad.

BYLES, J.—I am of the same opinion. Mr. *Prideaux's* best plea, as it seems to me, is a plea of a lost grant; and that may be considered in this stage of the discussion as an existing grant; and the effect of it is, that at some distant period the owner of the servient tenement granted to the owner of the adjoining dominant tenement, and to his heirs and assigns, the right to cut down all the trees and wood of every description, for any purpose, to be used where he pleased; and I think the authorities adduced by Mr. *Prideaux* clearly bring him half way towards the goal. They show that this is a profit à prendre, in which a man may have an inheritable estate: and my Lord Chief Justice pointed out in a very early stage of the argument what was \*115] the real difficulty. This may go to a man's heirs: but, how can it go to his assigns? It is in no way connected with the enjoyment of the dominant tenement. There is really no more connection here, than if the owner of an estate in Northumberland were to grant a right of way to the owner of another estate in Kent; because, as has been stated (see the case of *Ackroyd v. Smith*), an incident of this nature cannot, even by express words in an existing deed, be connected with the estate by the mere act of the parties. It must, in addition to that, have some natural connection with the estate, as being for its benefit, or, as has been expressed, it must inhere in the estate. Therefore, if an express grant to this effect had been produced between the grantee and grantor, and going as between the heirs of the grantee and grantor, it cannot run with the estate. Lord Brougham observed, as quoted in that case, that no new incident can be connected with the estate. I own it seems to me there is a further objection to the plea of prescription, and also to the thirty

years plea and the sixty years plea; and I agree with my Brother Willes, and I adopt his expression to the full extent, that such a claim of prescription as this is very absurd. That being so, it is unreasonable; and it is laid down that prescriptions must be reasonable. It is not enough to say it is possible to be granted. Even if this could by law be granted, I think it falls within the objection to a prescription, that it is unreasonable, and not only *ought not* to be inferred by a jury, but *cannot* be inferred in point of law, when such a right is claimed. I think, for these reasons, and I have no doubt whatever that Mr. *Prideaux* has laid before us all the cases upon the subject, that all the four pleas are bad, and the first three worse than the last.

KEATING, J.—All the pleas demurred to in this case \*speak of a claim to exercise upon the land of another a right having no reference to the occupation of the land to which the right so sought to be exercised is alleged to be attached. That seems to be, in a legal point of view, very like a contradiction in terms, and not supported by any authority; and therefore I think the pleas are bad. [\*116]

Judgment for the plaintiff.

*Prideaux* prayed leave to amend by limiting the claim to trees, &c., to be used on the close in the occupation of the defendant.

ERLE, C. J.—Upon payment of costs, the amendment may be made within eight days, otherwise judgment.

### SLEAP v. NEWMAN. April 28.

Although, in respect of rent, the personal liability of an executor of a lessee for years does not exceed the value of the demised premises, this qualification does not extend to a covenant for repairs.

Plea by an executor, that the demised premises had yielded no profit beyond what he had paid over to the lessor, that the premises came to him only as executor, and that he offered to surrender them before the breaches occurred,—Held (on the authority of *Tremeere v. Morrison*, 1 N. C. 89, 4 M. & Scott 603), bad on demurrer.

THE declaration stated, that theretofore, to wit, on the 2d of May, 1848, by an indenture then made between the plaintiff of the one part, and William Newman of the other part, the plaintiff let to the said William Newman certain messuages and tenements, with the appurtenances, To hold from the 29th of September then last for twenty-one years; and the said William Newman did thereby, for himself, his executors, administrators, and assigns, covenant with the plaintiff that he the said William Newman, his executors, \*administrators, and assigns, should and would at all times [\*117] thereafter during the said term, when and so often as need should be, at his and their proper costs and charges, well and sufficiently paint, whitewash, empty, cleanse, repair, support, and maintain in good and substantial repair, and keep the said messuages or tenements and other the premises thereby demised, and also once in every fourth year during the said term paint the external wood and iron-work of the said messuages or tenements thereby demised twice with good oil colour, and the inside thereof once in every seven years of the said term: that, by virtue of the said demise, the said William

Newman afterwards entered into the said demised premises and became and was possessed thereof for the said term so to him thereof granted as aforesaid; and that afterwards all the estate and interest of the said William Newman of and in the said demised premises, by assignment thereof duly made, came to and vested in the defendant; whereupon the defendant then entered into and upon the said demised premises, and became and was possessed thereof for the residue of the said term, and continued so possessed thereof from thence hitherto: Breach, that the defendant did not, after she became assignee as aforesaid, well or sufficiently paint, whitewash, empty, cleanse, repair, support, or maintain or keep in good and substantial repair the said demised premises, but therein made default; nor did she once in every fourth year of the said term which elapsed after she became assignee as aforesaid paint the external wood or ironwork of the said messuages or tenements thereby demised with good oil colour, or the inside thereof once in every seven years of the said term which elapsed after she became assignee as aforesaid, but therein made default; and the said demised premises were and are by the neglect, default, and \*118] \*misuser of the defendant after she became assignee as aforesaid, out of repair, and in a much worse condition than the same ought to have been and to be according to the said covenant: Claim, 200*l*.

Plea,—except as to 55*l*. 8*s*. 5*d*., parcel of the damages,—that, except as to the said parcel, the defendant ought not to be charged with the said breaches otherwise than as executrix of the last will and testament of the said William Newman, because she said that she was executrix of the last will and testament of the said William Newman, and that he died before this suit, and that the said estate and interest of the said William Newman was a chattel of the said William Newman at the time of his death, and that the same came to her as such executrix as aforesaid, and not otherwise, and that there never was any other assignment thereof to her; that she has never occupied personally the said premises, or derived any benefit whatsoever therefrom, otherwise than as herein stated, but has merely as such executrix as aforesaid dealt with and entered on the same as such executrix as aforesaid for the purpose of making and receiving the rents, issues, and profits thereof as such executrix, and paying the same over to the plaintiff in payment of the rent from time to time becoming due to the plaintiff under the demise in the declaration mentioned, which was a demise at a yearly rent of 42*l*., payable to the plaintiff; that she paid to the plaintiff, in payment of the said rent from time to time accruing, all the rents, issues, and profits which she had ever received or obtained, or which by the exercise of such care and diligence as she as executrix ought to have exercised she could possibly have received or obtained, except the said sum of 55*l*. 8*s*. 5*d*. parcel as aforesaid; that she had always been ready and willing to surrender, \*119] and before the committing of the breaches whereof the \*plaintiff complained, and after the death of the said William Newman, she offered to surrender to the plaintiff, all the said estate and interest which so came to her as aforesaid, but the plaintiff would not accept the same; that the yearly value of the said premises had continually since the death of the said William Newman been and then

was less than the rent so payable to the plaintiff as aforesaid, and that the said estate and interest subject to the said rent had never been and was not of any value whatever; and that, except the said estate and interest and the said sum of 55*l.* 8*s.* 5*d.*, she had fully administered all and singular the goods and chattels which were of the said William Newman at the time of his death, and which had ever come to her hands as executrix as aforesaid to be administered; and that, except as aforesaid, she had not at the commencement of this suit, or at any time since, nor had she at or after the times when the said covenant ought to have been performed, nor had she then in her hands as executrix as aforesaid to be administered, any goods or chattels which were of the said William Newman, deceased, at the time of his death; and that, except as aforesaid, she had not received any profit or advantage from the said estate and interest: and that there was no neglect, default, or misuser on her part, except simply omitting to perform the covenants as complained of; and that the whole of the said sum of 55*l.* 8*s.* 5*d.* was required for payment of the said rent due to the plaintiff from time to time and then in arrear, and which the defendant had always been ready and willing to pay to the plaintiff for and on account of such rent.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that, the lease having vested in the defendant, and she being the \*assignee thereof, she was liable personally [\*120 to perform the covenant to repair." Joinder.

*Kay*, in support of the demurrer.—The declaration charges the defendant as assignee with permitting the demised premises to be out of repair. The plea alleges, that the premises came to the defendant as executrix; that she derived no benefit from them, but merely as such executrix entered on and dealt with them for the purpose of receiving the rents, issues, and profits thereof, and paying the same over to plaintiff in payment of the rent from time to time becoming due to him under the demise in the declaration mentioned; that she paid to the plaintiff, in payment of the said rent from time to time accruing, all the rents, issues, and profits which she had ever received or obtained, or which by the exercise of such care and diligence as she as executrix ought to have exercised she could possibly have received or obtained; and that she had always been ready and willing to surrender, and before the committing of the breaches complained of, and after the death of the testator, offered to surrender to the plaintiff the estate and interest which so came to her as aforesaid, but that the plaintiff would not accept the same; and that, except, &c., she had fully administered: and the plea concludes with an averment, that the defendant had been guilty of no neglect or default, except simply omitting to perform the covenants the breach of which is complained of. The plea clearly affords no answer to the action. *Tremeere v. Morrison*, 1 N. C. 89 (E. C. L. R. vol. 27), 4 M. & Scott, 603 (E. C. L. R. vol. 30). is precisely in point. It was there held, that, where an administrator has occupied premises demised to the intestate, it is no plea to an action of covenant for non-payment of rent and taxes and for non-repair, to say that the premises yield no profit. *Tindal, C. J.*, in \*in giving judgment, says: "It would be strange, [\*121 indeed, to hold an executor to be exempted from liability in

respect of a covenant to repair, because the profits derived from the premises are not adequate to meet the costs of repairing. It would in effect be saying that the landlord shall not receive back the premises at the end of the term. Suppose the premises to be out of repair at the end of the first year, and the executor had no assets; at the expiration of another year they would naturally be in a worse condition; and so on from year to year,—the profits in the mean time becoming less every year: so that it might ultimately be impossible to restore them to a fit state of repair; and then, if the executor were without assets, at the end of the term the landlord would find the premises utterly destroyed, and be without remedy." "None of the authorities that have been cited go the length of showing that an executor or administrator who is sued as assignee is not chargeable in respect of non-repairs in the same manner as any other assignee." "The case of waste bears a strong resemblance to an action for non-repair. The law is clear that an action of waste would lie against an executor or administrator for any waste done in his time, as well for permissive as for voluntary waste. In Co. Litt. 54, it is said: 'If lessee for years doth waste and dieth, an action for waste lieth not against the executor or administrator for waste done *before their time*,'—leaving it to be inferred that the action would lie if the waste occurred *in their time*. In the case of *Tilney v. Norris*, 1 Ld. Raym. 553, 1 Salk. 309, Carth. 519, it is said: 'The executor or administrator of a tenant for years shall be punished for waste done in their own time; and the judgment for the damages shall be against them *de bonis propriis*. And there \*122] is no difference between permissive and voluntary waste that \*will influence this case, because the breach of covenant is in the nature of permissive waste; except that the case of waste is stronger, because treble damages are recoverable then, but single damages only in covenant. And, if the executor assigns over, waste will lie against him in the tenuit; therefore, it is not hard to support this action, and judgment shall be against him *de bonis propriis*.' Thus, an executor is liable for the continuance of waste that originally commenced in the time of his ancestor. I therefore see no reason why he should not also be liable in covenant for non-repair." [ERLE, C. J.—The authorities referred to there do not in the least sustain the proposition that there is any difference between rent and repairs. In *Reid v. Lord Tenterden*, 4 Tyrwh. 111, 120, Bayley, B., says: "If the premises were out of repair at the testator's death, it became the executor's duty to apply his general assets to perform that repair as well as to pay any rent then due."]

*Hance, contra.*—*Tremeere v. Morrison* is cited without disapprobation in *Hornidge v. Wilson*, 11 Ad. & E. 645, 3 P. & D. 641. Independently of those cases, there are numerous authorities to show that a plea like this is good. Every necessary allegation to exonerate the executrix is found in it. In *Wollaston v. Hakewill*, 3 M. & G. 297, 321 (E. C. L. R. vol. 42), 3 Scott N. R. 593, 614, Tindal, C. J., in delivering the judgment of the Court, says: "The executor is the assignee in law of the term, according to the known distinction between assigns in law and assigns in fact. Such is the doctrine laid down in 5 Co. Rep. 17 b (*Spencer's case*), viz. 'If a man covenants with another, his executors and assigns, the assignee of an assignee

shall have an action of covenant. So of the executors of the assignee of the assignee. So of the assignees of the executors or administrators \*of every assignee: for, all are comprised within this word [\*123 *assignees*; for the same right which was in the testator or intestate shall go to his executors or administrators.' And, as to the argument that the executor, by being charged generally as assignee, becomes thereby liable *de bonis propriis*, the answer is, that he may by proper pleading discharge himself from personal liability, by alleging that he is no otherwise assignee than by being executor or administrator of the lessee, and that he has never entered or taken possession of the demised premises; and, as is well known, from all liability as executor, by alleging that the term is of no value, and that he has fully administered all the assets which have come to his hands." [BYLES, J.—In *Tremeere v. Morrison*, the pleas did not allege an offer to surrender. And in *Reid v. Lord Tenterden*, Bayley, B., says that "the offer to surrender the lease, if promptly made, and pleaded according to the fact, will help the defendant as to all the breaches laid, particularly as far as respects the want of repair accruing after it was made, though it may not cover any preceding default in that respect."] That must mean that it would afford a good defence if properly pleaded. [WILLES, J.—The assets to be administered are assets over and above the rent.] It is difficult to see any distinction, in principle, between a claim for rent and a claim for non-repair. In *Hopwood v. Whaleby*, 6 C. B. 744 (E. C. L. R. vol. 60), it was held that the executor of a lessee for years is, in the absence of other assets, liable *de bonis propriis* for the rent reserved, to the extent of the profit he has derived from the premises, or which he might by the exercise of reasonable diligence have derived from them. That, it is submitted, is the full extent to which the present defendant can be liable.

*Kay*, in reply.—The cases of *Tremeere v. Morrison* \*and [\*124 *Hornidge v. Wilson* show that there is a distinction between rent and repairs. *Tremeere v. Morrison*, which is precisely in point, is cited with approbation in *Williams's Executors*, 5th edit. 1598. There can be no good reason why an executor, like any other assignee, should not be held responsible for letting the premises be out of repair.

ERLE, C. J.—*Tremeere v. Morrison* appears to me to be precisely in point; and we must hold ourselves bound by it. Speaking for myself, if this were *res integra* I do not think it necessary to say what opinion I should have formed. It is enough to say that the matter is concluded by authority.

The rest of the Court concurring, Judgment for the plaintiff.

THOMAS HOYLE and Others, Appellants; ORAM, Respondent. *May 5.*

The appellants carried on the business of calico-printers at two places distant from each other seven miles. The business of a calico-printer consists of four processes, viz., bleaching, printing (by impressing the pattern on the bleached cloth by means of mordants), dyeing, and finishing. Three of these processes, viz., the bleaching, dyeing, and finishing, were performed at one branch of the establishment, and the fourth, viz., the *printing*, at the other.

Held, that a child employed on the premises where the *bleaching, dyeing, and finishing* were performed, was employed in an "incidental printing process," within the 2d section of the 8 & 9 Vict. c. 29; and that the place where he was so employed formed part of "the establishment where the chief process of printing was carried on," within the meaning of that Act: and, consequently, that the appellants were not liable to be convicted of an offence against the Bleaching Works Act, 23 & 24 Vict. c. 78, in employing him without a schoolmaster's certificate.

THE following case was stated for the opinion of the Court, pursuant to the statute 20 & 21 Vict. c. 43:—

\*125] At a petty sessions held at the Temperance Hall, in \*Francis Street, in Dukinfield, in the county of Chester, before three of Her Majesty's justices of the peace for the said county, on the 31st of October, 1861, Thomas Hoyle & Sons, the above-named appellants, were charged in and by a certain information and complaint, "For that the said Thomas Hoyle & Sons had offended against the Act made and passed in the session of Parliament held in the 23d and 24th years of Her present Majesty's reign, intituled 'An Act to place the employment of women, young persons, and children, in bleaching works and dyeing works under the regulations of the Factories Acts,' and the Acts therein recited and referred unto; Forasmuch as they the said Thomas Hoyle & Sons on the 2d of October, 1861, at the township of Dukinfield aforesaid, being then and there the occupiers of certain works in the said information and complaint alleged to be bleaching works within the said last-mentioned township, the same being, as alleged in the said information and complaint, bleaching works within the true intent and meaning of the said first-recited Act, the said last-mentioned day being Wednesday in a week after the first week in which one Joseph Platt, a child under the age of thirteen years then and there employed in the said alleged bleaching works, began to work in the said works, did not on that day, or on any other day appointed for that purpose by the inspector of factories, obtain a certificate from a schoolmaster, according to the form and directions given in the schedule A. annexed to a certain Act made and passed in the seventh year of Her Majesty's reign, intituled, 'An Act to amend the laws relating to labour in factories' (7 & 8 Vict. c. 15), that such said child had attended school as required by law during the foregone week; whereby it was alleged that the said Thomas Hoyle & Sons had forfeited for the said offence a penalty of not less than 20s., and not more than 5l."

\*126] \*At the hearing of the said information and complaint, it was proved before the justices, and they found as facts, that the appellants were, at and before the time of the said alleged offence as charged in the said information and complaint, persons carrying on the trade and business of calico-printers, and occupying and using for the purposes thereafter expressed, certain buildings and works situated at Mayfield, in the city of Manchester, in the county of Lan-

caster, on or adjoining to the river Medlock there, and also certain buildings and works situate at Sandy Vale, in Dukinfield aforesaid, on or adjoining to the river Tame there; which last-mentioned buildings and works are the works in the said information and complaint mentioned as bleaching works. The said works at Dukinfield are distant from the said works at Mayfield about seven miles.

The processes of calico-printing, as practised by the appellants in their said business, were and are as follows:—

The cotton cloth to be printed, being in its original state as manufactured called the gray state, is in the first place bleached. After the cloth has been bleached, the intended pattern or design is impressed thereon in certain chemical substances called mordants, by means of blocks or cylinders. The cloth is then dyed by being immersed in a liquid solution of colouring matter. The colouring matter combines chemically with the mordant on those parts of the cloth on which the pattern or design has been impressed as aforesaid, and becomes fixed or fast in those parts. On the parts of the cloth not impressed with the mordant, the colouring matter is not fast, but is only mechanically deposited, and may be removed by washing and other means, so as to leave those parts of the cloth unaffected by the colouring matter; the colour being exhibited only in the parts \*impressed with the [\*127 pattern or design as aforesaid. This having been done, the cloth is stiffened and made ready for the market, which processes are known by the name of "finishing."

Four specimens of cotton cloth were produced before the justices, and accompanied the case. No. 1 was the cloth in the gray state, No. 2 was the cloth when bleached, No. 3 the cloth impressed with the design or pattern in the mordant, and No. 4 the cloth after having been dyed and finished, and exhibiting the completed design or pattern.

All the several processes described are necessary to the completion of the article which the said Thomas Hoyle & Sons produce and deal in, namely, printed calicoes in a condition for sale.

The article printed calico, as a commercial article, could not be produced if any of the processes were omitted. Formerly, all the processes described were performed by the appellants at their works at Mayfield. Those works having become inadequate, by the increase of their business, and by the deterioration and deficiency of the water of the river Medlock, the appellants many years ago took, and have since occupied, the works at Sandy Vale.

At these works they have since performed all the bleaching of the cotton cloth printed by them, and the greater part of the dyeing thereof, and the processes of finishing. The impressing of the designs or patterns on the cloth with the mordants is performed wholly at the Mayfield works. The cloth when purchased from the manufacturers is sent to the works at Sandy Vale and there bleached. When bleached, the appellants send it to their works at Mayfield, where the pattern is impressed with the mordant. They then send it back to the Sandy Vale works, where it is dyed, except some small portions, which are dyed at Mayfield, \*according to the extent of the [\*128 accommodations there. When dyed, it is finished at Sandy Vale, and when finished, is returned to the Mayfield works, whence it is sent to the appellants' warehouse for sale.

If all the processes were performed in one building, the cloth would have to be removed from one room to another to have the several processes successively performed on it. The chief process of printing the cloth is carried on at the Mayfield works, and the processes of bleaching, dyeing, and finishing, necessary to the completion of the printed calicoes for sale, at the Sandy Vale works.

The appellants do not bleach, dye, or finish cloth at the works at Sandy Vale for any purpose other than the purposes of and in the course of their business of calico-printers; but the bleaching so performed by them is similar to the better sort of bleaching performed by bleachers who carry on the business of bleaching for hire as a separate trade.

The appellants' works at Mayfield and Sandy Vale are parts of one and the same commercial concern, that is to say, they belong to the same partners, and both are superintended by Alfred Nield, one of the partners in the firm of Thomas Hoyle & Sons, and both are necessary to the production and completion of the same article, namely, printed calico in condition for sale; and the works at Mayfield are the principal seat of the business of the firm, where all the principal accounts are kept as well relating to the Mayfield works as to the Sandy Vale works. Secondary accounts, such as wages-books and the like, are kept at Sandy Vale, in respect of what is done there, and are forwarded periodically to Mayfield, and are there incorporated in the general accounts of the concern. No separation of profits is made as between the works at Mayfield and those at Sandy Vale. All the \*129] accounts \*are blended together, and the profits are the common result of the operations carried on at both works. All accounts are paid at Mayfield, and all moneys required at the Sandy Vale works for payment of wages or other purposes are sent from Mayfield.

It was admitted on the part of the appellants, and the justices found as facts, that, in respect of the said Joseph Platt, who was employed by them at the said works at Sandy Vale, and was under the age of thirteen years, they had not obtained such certificate as in the said information and complaint mentioned, in compliance with the provisions and directions of the said Act 7 & 8 Vict. c. 15. And it was thereupon contended by the complainant, that, by virtue of the last-mentioned Act and of the 23 & 24 Vict. c. 78, the appellants had become liable to such penalty as in the said complaint alleged. But it was contended by the appellants, that, under the facts proved as aforesaid, their said buildings and works at Sandy Vale were not bleaching-works within the true intent and meaning of the said Act of 23 & 24 Vict. c. 78, but that the same were buildings and premises used solely for the purposes declared to be "incidental printing processes" in an Act of the 8 & 9 Vict. c. 29, intituled "An Act to regulate the labour of children, young persons, and women, in print-works," and formed parts of the establishment where the chief process of printing is carried on by the appellants, and were therefore exempted from the operation of the said Act of the 23 & 24 Vict. c. 78, under the provisions and exceptions contained in the 9th section of that Act; and that the last-mentioned Act did not apply to the said works at Sandy Vale, or to the appellants as the occupiers thereof, or

to the said Joseph Platt as a person employed therein. But the justices, being of opinion, upon the facts proved as aforesaid, that the works at Sandy Vale were "bleaching works" \*within the [\*130 intent and meaning of the said Act of 23 & 24 Vict. c. 78, held and determined that the appellants had offended against the said Act of the 7 & 8 Vict. c. 15, as charged in the said information and complaint, and they therefore convicted the appellants of the said offence, in the penalty of 20s. and costs.

The question for the opinion of the Court was, whether the said determination was correct in point of law, and what should be done in the premises.

*Mellish, Q. C.* (with whom was *Pope*), for the appellants.(a)—The question is whether the appellants' works come within the Regulation of Labour in Print Works Act, 8 & 9 Vict. c. 29, or the Bleaching and Dyeing Works Act, 23 & 24 Vict. c. 78. The 23d section of the 8 & 9 Vict. c. 29, enacts, that "the parent or person having any direct benefit from the wages of any child employed or intended to be employed in a print-work, shall cause such child to attend some school for at least thirty days, together or separately, exclusive of Sundays, during the half-year between the 1st of \*January and [\*131 the 30th of June, both days inclusive, and in like manner for thirty days during the half-year between the 1st of July and the 31st of December, both days inclusive, in each year during any part of which it shall be employed in a print-work; such attendance being after the hour of 8 o'clock in the morning, and before the hour of 6 o'clock in the evening; and such attendance shall not be less than 150 hours during each half-year." The 25th section enacts that "the occupier of every print-work shall, before employing any child therein, obtain from a schoolmaster a certificate, according to the form and directions given in the schedule A. to the Act annexed, that such child had attended school for at least fifty days, as required by this Act, during the half-year ending on the 30th of June or 31st of December next before the beginning of such employment, and the like certificate at the beginning of each following period of six months during which the employment of such child shall be continued in that print-work; and such occupier shall keep every such certificate so long as such child shall continue in his employment for twelve months after the date thereof, and shall produce the same to any inspector or sub-inspector [of factories], when required, during such period." The penalty for a neglect to comply with these requirements is, by s. 44, "not less than 2*l.*, and not more than 5*l.*" By the interpretation clause, s. 2, it is enacted, that, "in this Act, unless

(a) The points marked for argument on the part of the appellants were as follows:—

"1. That the works at Sandy Vale, under the circumstances detailed in the case, were not 'bleaching works' within the meaning of the statute 23 & 24 Vict. c. 78, but were used solely for the purposes declared by the Act of 8 & 9 Vict. c. 29 to be 'incidental printing purposes:'

"2. That the said works at Sandy Vale forms parts of the establishment at Mayfield, where the chief process of printing is carried on by the appellants, and are therefore excepted from the operation of the said Act of 23 & 24 Vict. c. 78, by virtue of the provisions and exceptions contained in s. 9 of the said Act:

"3. That the 23 & 24 Vict. c. 78, did not and does not apply to the said works at Sandy Vale, nor to the appellants as the occupiers thereof, nor to Joseph Platt, in the said case named, as a person employed therein."

another sense shall be plainly shown by the context, or by some positive enactment to the contrary, the words 'print-work' shall be taken to mean any building or shed, and any part thereof, within which any persons are employed to print figures, patterns, or designs, by means of blocks or cylinders, or by means of any other tool, instrument, or mechanism, upon any woven fabric of cotton, wool, \*132] \*hair, fur, silk, flax, hemp, or jute, either separately or mixed together, or mixed with any other material; or upon any felted fabric of wool or fur, either separately or mixed with any other material; or upon any cotton, linen, woollen, worsted, or silken yarn: and the words 'incidental printing process' shall be taken to mean any process of preparing, dyeing, bleaching, cleaning, calendering, dressing, or finishing incident or necessary to the completion of the chief process of printing figures, patterns, or designs upon any of the aforesaid materials, and carried on within buildings, sheds, fields, or portions of ground lying adjacent to each other, or forming a part or parts of the establishment where the chief process of printing as aforesaid is carried on: and the word 'child' shall be taken to mean a child under the age of thirteen years: and any person who shall work in any print-work, whether for wages or not, or as a learner or otherwise, either in printing or in any *incidental printing process*, or in cleaning any part of the print-work, or in cleaning any block, cylinder, tool, or machine used therein, or in any other kind of work whatsoever, save in the cases hereinafter excepted, shall be deemed to be employed therein, within the meaning of this Act." The 39th section of the Factory Act, 7 & 8 Vict. c. 15, enacts that "the occupier of every factory in which a child is employed shall on Monday in every week after the first week in which such child began to work in the factory, or on any other day appointed for that purpose by an inspector, obtain a certificate from a schoolmaster, according to the form and directions given in the schedule A. to this Act annexed, that such child has attended school as required by this Act during the foregone week," &c. This and the other statutes regulating the labour of children, young persons, and women in mills and factories, are \*133] declared to apply to bleaching and dyeing \*works by the 23 & 24 Vict. c. 78, the seventh section of which enacts that, "in the construction of this Act, the words 'bleaching-works' and 'dyeing-works' shall be understood respectively to mean any building, buildings, or premises in which females, young persons, and children, or any of them, are employed, and in one or more of which buildings or premises any process previous to packing is carried on in the occupation of bleaching, dyeing, or finishing of any yarn or cloth of cotton, silk, wool, or flax, or any of them, or any mixture of them, or any yarn or cloth of any other material or materials, and in one or more of which processes, steam, water, or other mechanical power is used or employed." And the 9th section enacts that "nothing in this Act contained shall extend or apply to any person in so far as they are employed in the open air, or to any building, buildings, or premises used solely for the purposes declared in the 8 & 9 Vict. c. 29, or to the occupier of such building, buildings, or premises in respect thereof, or to any person or persons employed solely in the manner declared and regulated by the said Act, or to any premises, either

open, enclosed, or covered, used or to be used *bonâ fide* or exclusively for the purposes of carrying on the process, occupation, trade, or business of Turkey-red dyeing, or to any employment necessary or incident thereto, or to the occupier of such premises in respect thereof, or to the employment upon such premises of any females, young persons, or children solely engaged or employed in any such process, occupation, trade, business, or employment."

The question is, whether the works of Messrs. Hoyle as described in this case come within the definition of premises in which an "incidental printing process" is carried on within the meaning of the 8 & 9 Vict. c. 29, s. 2. Are the premises at Sandy Vale and those at \*Mayfield "adjacent to each other or forming part or parts [\*184 of the establishment where the chief process of printing is carried on?" The case finds, that, though the two form part of the same "commercial concern," in the sense of both belonging to the same firm, they are *seven miles* apart. All the "incidental printing process," viz. the bleaching, dyeing, and finishing, are carried on at Sandy Vale, although the chief process of printing, viz. the impressing the pattern on the cloth by means of mordants, is carried on at Mayfield. [ERLE, C. J.—It seems odd that children employed in print-works should be supposed to require a different degree of attention from those employed in bleaching and dyeing works.] Until the 23 & 24 Vict. c. 78, there was no statutory provision regulating the employment of women and children at bleaching and dyeing works. The whole question turns upon the meaning of the words in s. 2 of the 8 & 9 Vict. c. 29, "lying adjacent to each other." [BYLES, J.—"or forming a part or parts of the *establishment* where the chief process of printing as aforesaid is carried on." ERLE, C. J.—Your contention is, that bleaching and dyeing, as incidental to the process of printing, bring the case within the 8 & 9 Vict. c. 29, and therefore take it out of the 23 & 24 Vict. c. 78?] Yes.

*Welsby* (with whom was *The Attorney-General*), for the respondent.(a)—The appellants' works at Sandy Vale are "bleaching works" within the meaning of the 23 & 24 Vict. c. 78. It is not unimportant to \*observe that the words "incidental printing process" in [\*185 the interpretation clause of the 8 & 9 Vict. c. 29, are to be found in no other part of the Act. It appears that the appellants are in possession of an "establishment" consisting of two parts which are seven miles distant from each other, in which they carry on conjointly the several processes of calico-printing, viz. the bleaching, the printing, the dyeing, and the finishing. The works at Sandy Vale are bleaching-works within the meaning of the 23 & 24 Vict. c. 78, unless taken out of the operation of that Act by the language of the 2d section of the 8 & 9 Vict. c. 29. The words relied on for that purpose are,—“the words ‘incidental printing process’ shall be taken to mean any process of preparing, dyeing, bleaching, cleaning, calendering, dressing, or finishing, incident or necessary to the completion of

(a) The points marked for argument on the part of the respondent were as follows:—

"1. That the works at Sandy Vale were 'bleaching works' within the intent and meaning of the 23 & 24 Vict. c. 78:

"2. That the appellants had offended against the said Act and the Acts therein recited and referred to."

the chief process of printing figures, patterns, or designs upon any of the aforesaid materials, and carried on within buildings, sheds, fields, or portions of ground lying adjacent to each other, or *forming a part or parts of the establishment where the chief process of printing as aforesaid is carried on.*" The obvious meaning is, that, if there be one large establishment in which the various incidental processes are all carried on, the statutory regulation as to children employed therein shall be observed. The words "same establishment" mean the same factory and buildings. It never could have been intended that a child working at the Sandy Vale branch of this establishment should not have the same rights of protection in regard to educational improvement and surveillance as a child working at the Mayfield branch. This is one of the very cases to which the 23 & 24 Vict. c. 78 was intended to apply; because the child so employed could not have the benefit of the Print Works Act, 8 & 9 Vict. c. 29.

\*136] *Mellish*, in reply, was stopped by the Court.

ERLE, C. J.—I am of opinion that the conviction in this case was wrong. The appellants were convicted for having employed a boy under the age of thirteen in certain bleaching works, without complying with the requirement in the Bleaching Works Act, 23 & 24 Vict. c. 78, as to obtaining a schoolmaster's certificate according to the directions contained in the Factory Act, 7 & 8 Vict. c. 15. The child was employed at the appellants' establishment at Sandy Vale, where the operations of bleaching, dyeing, and finishing,—which are operations incidental to the production of an article called printed calico,—alone are performed; the operation of printing or impressing the figure or pattern on the cloth being done at another establishment belonging to them at a place called Mayfield, seven miles distant from Sandy Vale. The conviction, therefore, was right, unless the case be taken out of the 23 & 24 Vict. c. 78, by the 2d section of the 8 & 9 Vict. c. 29, which enacts that "the words 'incidental printing process' shall be taken to mean any process of preparing, dyeing, bleaching, cleaning, calendering, dressing, or finishing incident or necessary to the completion of the chief process of printing figures, patterns, or designs upon any of the aforesaid materials, and carried on within buildings, sheds, fields, or portions of ground *lying adjacent to each other, or forming a part or parts of the establishment* where the chief process of printing as aforesaid is carried on." Was this child employed in "print-works" within the meaning of the 9 & 10 Vict. c. 29? If he was, the case is out of the operation of the 23 & 24 Vict. c. 78. It appears that the appellants are engaged in the production of printed calicoes for sale; and that there are four several processes which are

\*137] incidental to the converting gray cloth into printed calicoes. In the first place, the cloth is bleached; then the mordant is impressed upon it, to cause it to take the pattern in dyeing; then it is dyed; and then, lastly, it is finished by stiffening. The three processes of bleaching, dyeing, and stiffening,—are all processes incidental to the principal process of printing by the application of the mordant. The child Pratt was employed at Sandy Vale, where the cloth is bleached, dyed, and stiffened. He therefore was employed in an incidental printing process, and so far clearly comes within the 8 & 9 Vict. c. 29. Then, it is not every incidental process that is excepted: it

must be a process which is "carried on within buildings, sheds, &c., lying adjacent to each other, or forming a part or parts of the establishment where the chief process of printing as aforesaid is carried on." The three "incidental processes" here are all performed at Sandy Vale, and therefore in buildings adjacent to each other. But that is not the ground upon which my mind is brought clearly to the conclusion that the exception in the 9th section of the 23 & 24 Vict. c. 78 applies to these appellants; because, in my opinion, the buildings at Sandy Vale form part of the establishment at which the principal process, the printing, is done, viz., Mayfield. It appears that the works at Mayfield having some years ago become inadequate, by reason of the increase of the business and by the deterioration and deficiency of the water of the river Medlock, the appellants transferred part of their works to Sandy Vale: but that the principal part of the work continued to be carried on at Mayfield, which was the principal seat of the firm. In a commercial sense, therefore, Sandy Vale clearly was part of one entire establishment. It was contended for the respondent that the statute did not mean forming part in a commercial sense, but in a \*popular and local sense. But I see no [\*138 reason for confining the meaning to local proximity. The whole substantially forms one establishment. It seems to me that bleaching was purposely left out of the first Act; but that the bleaching and the other processes "incidental to the printing process" are within it, and stand upon the same footing as printing, and that the boy is to have the benefit of that Act. Moreover, the Act has this further interpretation, that "any person who shall work in any print-work, whether for wages or not, or as a learner or otherwise, either in printing or in any incidental printing process, or in cleaning any part of the print-work, or in cleaning any block, cylinder, tool, or machine used therein, or in any other kind of work whatsoever (save in the cases thereafter excepted), shall be deemed to be employed therein within the meaning of this Act." It is clear, therefore, that this child was employed in an incidental printing process, and therefore a conviction under the 23 & 24 Vict. c. 78 cannot be sustained.

WILLES, J.—I am of the same opinion.

BYLES, J.—The case is not without difficulty. But, upon the whole, I see no reason to dissent from what has fallen from my Lord.

KEATING, J., concurred. Decision reversed, without costs.(a)

(a) See the next two cases.

\*ROBERT HOWARTH, Appellant; ROBERT WILLIAM COLES, Respondent. *June 28.*(a) [\*139

One whose sole business consists in the "finishing" of cotton fabrics, but who neither bleaches nor dyes, is not within the operation of the Bleaching and Dyeing Works Act, 23 & 24 Vict. c. 78.

The "finishing" spoken of in the 7th and 11th sections of that Act refers to the process of finishing which is incidental to dyeing, and not to the dealing with fabrics which are neither bleached nor dyed.

(a) This and the following case are placed here because they relate to the same subject as the foregoing.

MR. ROBERT HOWARTH, of Gaythorn, in the city of Manchester, percher, stiffener, raiser, and shearer,—that is to say, a finisher of fustians,—(the appellant), appeared before Mr. Ellison, the stipendiary magistrate for the said city, on the 3d of September, 1861, pursuant to a summons obtained against him by Mr. Robert William Coles, sub-inspector of factories, upon an information and complaint which (omitting formal parts) was in the following words:—

“That the said Robert Howarth had offended against the Act made in the 7th year of Her Majesty’s reign, intituled ‘An Act to amend the laws relating to labour in factories’ (7 & 8 Vict. c. 15), as amended by the Acts made in the 13th and 14th years of Her Majesty’s reign, intituled ‘An Act to amend the Acts relating to labour in factories’ (13 & 14 Vict. c. 54), and by an Act made in the 16th and 17th years of Her Majesty’s reign, intituled ‘An Act further to regulate the employment of children in factories’ (16 & 17 Vict. c. 104), and by an Act made in the 23d and 24th years of Her Majesty’s reign, intituled ‘An Act to place the employment of women, young persons, and children in bleaching works and dyeing works under the regulations of the Factories Acts’ (23 & 24 Vict. c. 78), forasmuch as the said Robert Howarth, on the 15th of August, 1861, at Manchester, being then and there the occupier of certain bleaching works within the true intent and meaning of the last-recited Act, did then and there in \*140] his said bleaching works employ one \*John Davies, a child under the age of thirteen years, without having obtained a certificate from a schoolmaster that the said child had attended school during the foregone week, as required by the said first-recited Act, contrary to the said recited Acts.”

It was proved upon the hearing of the information, that John Davies, being a child under thirteen years of age, was employed by and worked for the appellant at his works in the city of Manchester; that, on the 15th of August last, the said John Davies was employed at work done by a machine called a “raising machine;” that “raising” is part of the process of “finishing” fustians; and that the operation of finishing fustians was done at the appellant’s works: but it was proved that no “bleaching” or “dyeing” was done at those works.

It was admitted, on the part of the appellant, that the certificate of school attendance required by the statute 7 & 8 Vict. c. 15, ss. 31, 56, had not been obtained; and that the said Robert Howarth was liable to the penalty imposed by s. 56 of the 7 & 8 Vict. c. 15, and the 1st section of the 23 & 24 Vict. c. 78 (the “Bleaching and Dyeing Works Act, 1860”), if the works of the said Robert Howarth were “bleaching works” within the provisions of the said Bleaching and Dyeing Works Act, 1860. This was the only question in dispute before the magistrate.

The following descriptions of the various operations carried on at bleaching works, ordinarily so called, at dyeing works, ordinarily so called, and at the appellant’s works, respectively, were given before the magistrate, and were to be taken for the purpose of this case to be correct:—

Cotton cloth as taken from the loom of the manufacturer is designated by the name of “gray goods,” and whilst in that condition is

described in the trade \*as being "in the gray." In order to fit it for the market (unless sold by the merchant in the gray), it [\*141 is necessary for it to undergo one or more processes.

Certain descriptions of heavy cotton goods called fustians, mole-skins, &c., are sold to the merchant by the manufacturer in the gray, without being either bleached or dyed. Previously to these being sold by the merchant they are sent by him from his warehouse to the percher, stiffener, raiser, and shearer, and to the fustian-cutter, and are subjected to various processes. When sent to the fustian-cutter, they are "cut," that is, the surface is divided by a knife into various ribs for the entire length of each piece. Perching, stiffening, raising, shearing, and cutting are all processes of finishing; and with some classes of goods, they, some, or one of them, are the only processes performed upon them after manufacturing.

Preparatory to "cutting" the cloth requires to be "perched," which is a process whereby a "nap" or "pile" is raised or produced on the back of the cloth, or "stiffened," that is, coated with a paste or size.

"Raising and shearing" may be shortly described as follows:—The cloth is sent in the gray from the warehouse of the merchant to the raiser and shearer, by whom in the process of "raising" it is passed over revolving rollers clothed with wire cards (the machine being known by the name of a "raising machine"), which raises or produces a "nap" or "pile" on the face of the cloth. In shearing, the cloth is run through a machine to shear or cut off a certain portion of the nap or pile which has been raised by the raising machine.

If the cloth requires "stiffening," it is "stiffened" previously to shearing.

The cloth is "hooked" or "plaited," and returned to the merchant.

\*These operations of raising, shearing, perching, and stiffening, are done at the appellant's works, and constitute his sole [\*142 occupation or business. This occupation or business is carried on as a separate and independent trade by the appellant; and no process connected with bleaching or dyeing is conducted upon the premises. After the appellant has performed the last-named processes upon cloth that requires to be "dyed," it does not come again to his hands, but is "cut" by the "fustian-cutter," and is then sent to be "dyed" and "finished." This applies to goods that are only in part finished by the appellant.

"Bleaching" converts gray goods into white goods. This is effected by various processes; and these differ according to the kind of cloth and the purposes for which it is intended. In the case of the lighter description of cotton cloth called "calicoes," the first process at the bleach works is to "fire" it. That is done by passing the cloth over heated iron or gas-lights; and the object is to take the woolly fibres off the face of the cloth. It is next washed and boiled in various vessels or kiers, in connection with which various chemical compounds are used, until the cloth becomes white. It is then passed through a machine called a "wetting out mangle" or "squeezer," for the purpose of taking out the creases. This completes the process of "bleaching" (calicoes), strictly so called. The cloth is afterwards "finished." To effect this, the cloth is "stiffened," which is effected by compressing a certain quantity of liquid starch into the cloth by means of

a machine called a "stiffening machine;" after which the cloth is "dried;" and lastly it is "calendered," that is, pressed between revolving cylinders or rollers which are either heated or cold according to the kind of "finish" intended to be put upon the cloth. It is then \*143] hooked or plaited into \*folds, and finally "packed," that is, placed between bleachers' boards, or wrapped in sheets, for the purpose of conveyance from the works to the warehouse of the manufacturer or merchant. All the various processes above mentioned as being undergone by the cloth subsequent to "squeezing" and previous to "packing," are called in the trade by the collective name of "finishing," and are almost invariably, but not always, carried on at the same works as the "bleaching," and in connection with and as part of the trade or occupation of bleaching.

In the case of fustians, the first process at the bleach works is, to "ash" and "sour" it. That is done by first passing the cloth through a liquor composed of soda and boiling water, and afterwards through a liquor composed of vitriol and water. It is then passed through other liquor in which various chemical compounds are used, until the cloth becomes white. It is then passed through the "wetting out mangle" or "squeezer," for the purpose of taking out the creases. This completes the process of "bleaching" fustians, strictly so called. The cloth is afterwards "finished." To effect this upon bleached fustians, the cloth is "stiffened," as above described; after which it is dried, raised, and lastly it is hooked or plaited, and sent into the warehouse of the manufacturer or merchant. *The processes of "finishing" lastly mentioned are almost invariably, but not always, carried on at the same works as the "bleaching," and in connection with and as part of the trade or occupation of a bleacher.*

"Dyeing" converts gray goods into coloured goods, by the use of various colours in solution. In the case of "calicoes," the first process is to fire the cloth as mentioned above. It is afterwards "bleached" as hereinbefore described (if necessary for the purposes \*144] for which it is intended, but not otherwise), and then \*passed through the coloured liquid, and is then "dried." This completes the process of dyeing calicoes, properly so called. The cloth is afterwards "finished." To effect this, the cloth is stiffened, dried, and calendered, in like manner as mentioned above. It is then hooked or plaited, and finally conveyed to the warehouse of the manufacturer or merchant.

All the various processes above mentioned as being undergone by the cloth for the purpose of "finishing," are carried on at the same works as the "dyeing" process, and in connection with and as part of the trade or occupation of a dyer; *but none of them are carried on at the appellant's works, the appellant not being a finisher of the class of goods to which the above-mentioned processes apply.*

In the case of "fustians," the first process is to "perch" the cloth on the back, and, if the colour requires that it should be so, but not otherwise, the cloth is afterwards bleached as hereinbefore described, and is then passed through the coloured liquid, and then dried. This completes the process of dyeing fustians, properly so called. The cloth is afterwards "finished." To effect this, the cloth is stiffened, dried, raised, and sheared, in the like manner as mentioned above. It

is then hooked or plaited, and finally conveyed to the warehouse of the manufacturer or merchant. Many of the various processes of "finishing" are usually carried on at the same works as the dyeing process, and in connection with and as part of the trade or occupation of a dyer. The appellant does not perform any of the said several last-mentioned processes on dyed fustians.

In addition to what is hereinbefore stated as to "packing," the same expression is used to describe the making up of goods (by means of hydraulic pressure) in bales for exportation. Steam-power is used for \*this purpose; but this process is generally carried on at warehouses, and not at bleaching works or at the works of a percher, [\*145 stiffener, raiser, and shearer.

The trade, business, or occupation of the appellant is that of a percher, stiffener, raiser, and shearer, otherwise a finisher of gray goods, exclusively. No process connected with bleaching or with dyeing is carried on by him or upon his premises or any part thereof. The appellant does not buy or sell any goods, but only performs the four processes above mentioned upon gray goods belonging to other persons, which, after being returned by him to the customer, may be in whole or in part sold in the gray, or may be in whole or in part bleached and dyed on other premises. His premises consist of a building in which children within the meaning of the Factories Act are employed, and in which steam-power is used in the occupation of perching, stiffening, raising, and shearing, otherwise "finishing" of cloth of cotton, commonly called fustian.

On behalf of the appellant, it was contended before the magistrate that the Bleaching and Dyeing Works Act, 1860, viz. the 23 & 24 Vict. c. 78, only applied to "bleaching works" ordinarily so called, and "dyeing works," ordinarily so called; and that, as no process connected with bleaching or with dyeing was carried on by or on the premises of the appellant, and as his business was an occupation entirely separate and distinct from each of them respectively, his works were not "bleaching works" or "dyeing works" within the meaning of the statute.

It was further contended that the word "finishing" used in the statute was meant to apply strictly to the process of finishing performed by the bleacher on the bleached goods, and by the dyer on the dyed goods, as described above, and as ancillary to the principal \*operation of bleaching or dyeing; and that the words "finishing works" used in the 11th section of the statute were meant [\*146 to apply to that portion of the bleaching works or dyeing works (as the case might be) where the process of finishing, as ancillary to the principal operation as lastly described, was carried on.

Upon these facts, the magistrate decided that the offence charged against the appellant was proved, and convicted him in a penalty of 20s.; the ground of his decision being, that, according to the true interpretation of the 7th section of The Bleaching and Dyeing Works Act, 1860, taken in conjunction with the 11th section of the same statute, the works of the appellant were works within the provisions of that Act.

The appellant, being dissatisfied with this decision as being erroneous in point of law, required the magistrate to state a case pursuant

to the statute 20 & 21 Vict. c. 43, for the opinion of this Court; which he stated accordingly, as above.

The question for the opinion of the Court was, whether the decision was or was not erroneous in point of law.

*Mellish*, Q. C. (with whom was *Leresche*), for the appellant.—The question is whether the works of the appellant as described in this case are works within the meaning of the 7th section of The Bleaching and Dyeing Works Act, 1860, 23 & 24 Vict. c. 78. The title of the Act is, "An Act to place the employment of women, young persons, and children in bleaching works and dyeing works under the regulation of the Factories Acts." The 1st section recites that "it is the practice of some of the occupiers of bleaching works and dyeing works to keep females, young persons, and children at work during the night, and an unreasonable number of hours during the day; and \*147] \*that such practices are not necessary to the successful carrying on of those trades, but are very injurious to the health and morals of the females, young persons, and children employed therein, and it has become necessary to regulate the employment of such people, and to provide for the education of such children." It then recites the 3 & 4 W. 4, c. 103, the 7 & 8 Vict. c. 15, the 10 & 11 Vict. c. 29, the 13 & 14 Vict. c. 54, the 16 & 17 Vict. c. 104, and the 19 & 20 Vict. c. 38, commonly called the Factory Acts. The 1st section enacts, that, "from and after the 1st of August, 1861, the powers and provisions of the hereinbefore recited Acts shall apply and be held to apply to bleaching works and dyeing works, except works in which the operation of bleaching by the open-air process is the only operation of bleaching carried on, and to the employment of females, young persons, and children in bleaching works and dyeing works, except as aforesaid, to all intents and purposes as completely and effectually as if such bleaching works and dyeing works had been mentioned and included in the provisions of the hereinbefore recited Acts or any of them, except as is hereinafter provided." The material clause is the 7th, which enacts, that "in the construction of this Act, the words 'bleaching works' and 'dyeing works' shall be understood respectively to mean any building, buildings, or premises in which females, young persons, and children, or any of them, are employed, and in one or more of which buildings or premises any process previous to packing is carried on in the occupation of bleaching, dyeing, or *finishing* of any yarn or cloth of cotton, silk, wool, or flax, or any of them, or any mixture of them, or any yarn or cloth of any other material or materials, and in one or more of which processes, steam, water, or other mechanical power is used or employed." The word "finishing" was \*148] evidently put in here to include \*females, young persons, and children who might be employed in the finishing processes by bleachers or dyers; and clearly was not intended to apply to persons whose business, like that of the appellant, is confined to finishing, and has no connection whatever with bleaching and dyeing. If this were not so, the word "finishing" would be found in the title and preamble, and in the previous clauses of the Act. The appellant is neither a bleacher nor a dyer, but is merely a finisher of goods which are never bleached or dyed. The 11th section, which uses the word "finishing," carries the case no further. The registers of the days and hours of

employment given in the schedules, speak only of women and children employed at bleaching works or dyeing works. An information describing the alleged offender's works as "finishing works" clearly would be bad. Upon what pretence are these premises called "bleaching" rather than "dyeing works?" [BYLES, J.—It would seem from the language of the preamble that "finishing works," if there be such, are not within the mischief of the Act.] The 73d section of the 7 & 8 Vict. c. 15 and the 2d section of the 8 & 9 Vict. c. 29 speak of "finishing" as incidental to some process of manufacture. It is evident, therefore, that, when the legislature here speaks of finishing, it means only the operation of finishing by bleachers and dyers. [WILLIAMS, J.—Is there a distinct trade of "finishing" after the bleaching and dyeing?] There may be.

*Welsby* (with whom was *The Attorney-General*), for the respondent.(a) —The 7th section in so many words \*enacts that, "in the construction of this Act, the words 'bleaching works' and dyeing works' shall be understood respectively to mean any building, buildings, or premises in which females, young persons, and children, or any of them, are employed, and in one or more of which buildings or premises *any process previous to packing*, is carried on *in the occupation of bleaching, dyeing, or finishing* of any yarn or cloth of cotton, silk, wool, or flax, or any of them, or any mixture of them, or any yarn or cloth of any other material or materials, and in one or more of which processes steam, water, or other mechanical power is used or employed." The introduction of the word "finishing" was wholly unnecessary, if it was intended to convey no more than is suggested on the part of the appellant,—a process incident to bleaching or dyeing. The 11th section is even stronger than the 7th: it speaks of "the time within which a person may be employed in bleaching, dyeing, or *finishing works*." Nothing can be plainer than the language used. The interpretation clause gives a key to the meaning of the schedules as well as to the rest of the statute.

*Mellish* was heard in reply.

WILLIAMS, J.—I am of opinion that our judgment in this case must be for the appellant. This Act of Parliament certainly is drawn in language which admits of the arguments which have been urged by Mr. \**Welsby* in support of the conviction. I cannot say that there is not a mode of expression as to finishing,—especially [\*150 looking at the 11th section, which speaks of "finishing works,"—which would seem to be addressed to finishing works in the manner in which the appellant carries on such works. But, looking at the general scope of the Act, and at the language used in the schedules, I think it is impossible to come to any other conclusion than that by finishing is meant that sort of finishing which is incident to the trade of a bleacher or dyer, and not that which is carried on by the appellant

(a) The points marked for argument on the part of the respondent were as follows:—

"1. That, according to the true interpretation of the 7th section of the Bleaching and Dyeing Works Act, 1860, 23 & 24 Vict. c. 78, taken in conjunction with the 11th section of the same Act, the works of the appellant were works within the provisions of that Act:

"2. That the appellant had offended against the said Acts in the information mentioned by employing in his said bleaching works the said John Davies, a child under thirteen years, without having obtained a certificate from a schoolmaster, as by the said Acts required."

as a separate and independent trade. I think the conviction was wrong.

WILLES, J.—I see no reason for dissenting from the opinion formed by the rest of the Court.

BYLES, J.—I agree with my Brothers Williams and Willes. If it had not been for the somewhat loose framing of the 7th and 11th sections of the statute, it would have been plain beyond a doubt that the Act applies only to persons carrying on the business of bleaching and dyeing, and to works where those two operations are carried on; for, the preamble only strikes at bleaching and dyeing, and, as Mr. *Mellish* has pointed out, the schedules apply only to the registers to be kept by the occupiers of bleaching works and dyeing works. There is nothing in the first six sections of the Act to include “finishing.” In s. 7 the word “finishing” is used twice,—first, where it speaks of the premises in which “any process previous to packing is carried on in the occupation of bleaching, dyeing, or *finishing* of any yarn or cloth,” &c., which evidently means finishing as incident to the operations of bleaching or dyeing. And it is even more clear in the \*151] latter part of the section, which provides that “the \*words ‘the operation of bleaching by the open-air process’ shall include every process, whether of preparing, beetling, dyeing, *finishing*, or otherwise, to which yarn or cloth *bonâ fide* bleached in the open air in fields or greens is usually and properly subjected.” There, also, it seems to me, the word “finishing” means, and can only mean, completing the process of open-air bleaching. The only difficulty I have felt arises from the language of the 11th section. But there in all probability the legislature adopted the word “or” by inadvertence from s. 7. It may be that the Act includes finishing works, after bleaching and dyeing. That construction would be quite consistent with the two schedules. Upon the whole I cannot entertain any doubt that the finishing contemplated by the Act is the completion of the operation of bleaching or of dyeing.

KEATING, J.—I entirely concur with the rest of the Court in thinking that the conviction in this case cannot be supported.

Decision reversed.

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\*152] \*BENJAMIN TAYLOR, Appellant; WESTON HICKES, Respondent. *June 28.*

The 73d section of the Factory Act 7 & 8 Vict. c. 15, enacts that “the word ‘factory,’ notwithstanding any provision or exemption in the Factory Act (3 & 4 W. 4, c. 103), shall be taken to mean all buildings and premises wherein or within the close or curtilage of which steam, water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material or any fabric made thereof;” and “any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in a process incident to the manufacture carried on in the factory, shall be taken to be a part of the factory, although it may not contain any machinery:” and then comes this exception,—“but this enactment shall not extend to any part of such factory used solely for the manufacture of goods made entirely of any other material than those herein enumerated.”

The appellant was the occupier of premises in Birmingham in which steam-power was used to work machinery employed in manufacturing cotton and wool into “webbing,” of which he

made men's braces and horses' girths by cutting the material into lengths and sewing pieces of leather and buckles thereto. The buildings formed an enclosed square, entered from the street by a gateway: on the left was the building in which the steam-power was used and the webbing manufactured: on the right, within the curtilage, the manufacture of braces and girths was carried on in rooms entered from the square. One Heeley, a child under 13, was engaged in the last mentioned manufacture. His occupation was, the preparation of the pieces of leather for attaching to the webbing, by boring holes round the edges with an awl. No part of the webbing was ever placed in his hands or brought into the room; nor was there any machinery in the room where he was so employed.

Held, that this was an employment in a "factory," within the meaning of the Factory Acts, and that the appellant was liable to a penalty for a breach of the 30th section of the 7 & 8 Vict. c. 15.

THE following case was stated by the police magistrate for the borough of Birmingham, under the statute 20 & 21 Vict. c. 43:—

On the 23d of April, 1862, Benjamin Taylor (herein called the appellant) appeared before the police magistrate for the borough of Birmingham, in answer to a summons issued on the complaint of Weston Hickett, sub-inspector of factories (herein called the respondent), charging that he the said Benjamin Taylor, being an occupier of a certain factory within the true intent and meaning of the Factories Act, 7 & 8 Vict. c. 15, did, on the 14th of March preceding, employ in the said factory, after the hour of one in the afternoon of the same day, one George Heeley, a child; the said George Heeley having been employed in the same factory before noon of the same day.

The sections of the Factory Acts applicable to the case are the following:—

\*7 & 8 Vict. c. 15, s. 73, interpretation clause.

"*Child.*" The word "child" shall be taken to mean a child [\*153 under the age of thirteen years.

"*Employed.*" Any person who shall work in any factory, whether for wages or not, or as a learner or otherwise, either in any manufacturing process, or in any labour incident to any manufacturing process, or in cleaning any part of the factory, or in cleaning or oiling any part of the machinery, or in any other kind of work whatsoever (save in the case hereinafter excepted), shall be deemed, notwithstanding any other description, limitation, or exception of employment in the Factory Act 3 & 4 W. 4, c. 103, to be "employed" therein within the meaning of this Act.

"*Factory.*" And the word "factory," notwithstanding any provision or exemption in the Factory Act 3 & 4 W. 4, c. 103, shall be taken to mean all buildings and premises situated within any part of the United Kingdom, and wherein or within the close or curtilage of which steam, water, or any other mechanical power, shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material, or any fabric made thereof.

"*Room.*" And any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in any process incident to the manufacture carried on in the factory, shall be taken to be a part of the factory, although it may not contain any machinery. And any part of such factory may be taken

to be a factory within the meaning of this Act. But this enactment shall not extend to any part of such factory used solely for the purpose of a dwelling-house, nor to any part used solely for the \*154] \*manufacture of goods made entirely of any other material than those herein enumerated, nor to any factory or part of a factory used solely for the manufacture of lace or hats, or of paper, or solely for bleaching, dyeing, printing, or calendering.

7 & 8 Vict. c. 15, s. 30. "No child who shall have been employed in a factory before noon of any day, shall be employed in the same or any other factory, either for the purpose of recovering lost time or otherwise, after one o'clock P. M. of the same day."

Section 64. "The penalty for any offence against the Factory Act (as amended by this Act) for which no specific penalty is hereinbefore provided, shall be any sum not less than 2*l.*, and not more than 5*l.*"

The appellant is the occupier of buildings and premises in Birmingham in which steam-power is used to move and work machinery employed in manufacturing cotton and wool into a material termed "webbing." Of this material men's braces and horses' girths are made, by cutting the same into lengths and attaching to the ends of such lengths (by sewing) pieces of strong leather, and fitting the same with buckles, &c.

The appellant is a manufacturer also of braces and girths, using for the purpose both the webbing manufactured by himself and other webbing purchased by him. The webbing when made is a perfect fabric of itself; and the process of manufacturing webbing from cotton and wool, and the process of manufacturing braces and girths from webbing, are generally separate and distinct.

The buildings of the appellant form an enclosed square, entered from the street by a gateway. On the left hand as you enter is the building in which the steam-power is used and the webbing is manufactured. This is admitted to be a factory; and the education and \*155] hours of labour of the children \*employed in it are regulated by the provisions of the Factory Act.

On the right hand of the square, within the outer gates and boundary, and within the close and curtilage of the same buildings, the manufacture of braces and girths is carried on in rooms entered from the square: and, on the day mentioned in the summons, both before noon and after one o'clock in the afternoon of the same day, George Heeley, a child under thirteen years of age, was engaged in labour for the appellant in the last-mentioned manufacture.

His occupation was the preparation of the pieces of leather above mentioned for being stitched to the webbing, by boring holes round the edges with a fine awl. This was the only process in which he was employed. No part of the webbing itself was ever placed in his hands, or brought into the room. There was no machinery in the room.

The question was whether this was an employment in a "factory" within the meaning of the sections of the Factory Acts above mentioned.

It was contended on the part of the appellant that it was not, inasmuch as the work upon which the said George Heeley was employed was not a process incident to the manufacture carried on in the fac-

tory; that the "room" in which he was employed could not be taken to be a part of the factory,—the manufacture of girths and braces being a wholly distinct and separate business, and the material upon which he was employed not being one of those enumerated as requisite to constitute a factory regulated by the Act.

On the other hand, it was contended by the respondent, that, under the comprehensive terms of the interpretation clause, every part of the buildings and premises of the appellant within the close or curtilage must be taken to be part of the "factory;" that it was \*the object and intent of the legislature that every child and [\*156 young person engaged in any manufacturing process within the same should be under the protection of the Act for the purpose of education, &c.; and that the work in which the child George Heeley was engaged on the day in question was an employment within its meaning.

The magistrate was of opinion that the latter was the true construction of the statute; and he therefore convicted the appellant in the penalty of 40s.

A case having been demanded, the magistrate, in compliance with the provisions of the statute, asked the opinion of the Court upon the above case. If they should be of opinion that the conviction was legally and properly made, and that the appellant was liable as aforesaid, then the conviction was to stand; but, if the Court should be of a contrary opinion, then the complaint was to be dismissed.

*Harrington*, for the appellant.—The penalty alleged to have been incurred in this case is for a violation of the 30th section of the 7 & 8 Vict. c. 15, which enacts, amongst other things, that "no child who shall have been employed in a factory before noon of any day shall be employed in the same or any other factory, either for the recovery of lost time or otherwise, after one of the clock in the afternoon of the same day, save in the cases where children may work on alternate days." The forfeiture is imposed by s. 64, "not less than 2*l.*, and not more than 5*l.*" The question in this case turns entirely upon the construction of that part of the 73d section which gives the interpretation of the word "factory." It enacts that "the word 'factory,' notwithstanding any provision or exemption in the Factory Act [3 & 4 W. 4, c. 103], shall be taken to mean all buildings and premises situated within \*any part of the United Kingdom of Great Britain and Ireland wherein or within the close or curtilage of which steam, [\*157 water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material, or any fabric made thereof; and any room situated within the outward gate or boundary of any factory, wherein children or young persons are employed in any process incident to the manufacture carried on in the factory, shall be taken to be a part of the factory, although it may not contain any machinery; and any part of such factory may be taken to be a factory within the meaning of this Act; but this enactment shall not extend to any part of such factory used solely for the purposes of a dwelling-house, nor to any part used solely for the manufacture of goods made entirely of any

*other material than those herein enumerated*, nor to any factory or part of a factory used solely for the manufacture of lace, of hats, or of paper, or solely for bleaching, dyeing, printing, or calendering." It cannot be denied that steam-power was employed here, or that the room where the child in question worked is within the curtilage: but it is submitted that the penalty does not attach, because the room was a part of the factory, "used solely for the manufacture of goods made entirely of some other material than those enumerated in the Act," viz. leather. [BYLES, J.—What are the "goods" which are manufactured at this place? are they "braces" or "brace-ends?"] It is quite consistent with the statements in this case that the "braces" were made in London or elsewhere. [Welsby.—The case expressly states that "on the right-hand of the square, within the outer \*158] gates and boundary, and \*within the close and curtilage of the same buildings, *the manufacture of braces and girths is carried on in rooms entered from the square.*"] The boy's sole employment was piercing the leather ends, to prepare them for the process of sewing to the webbing. [WILLIAMS, J.—What the boy did is immaterial: the question is, what is the place in which he worked. The "room" is clearly within the enacting part of the section. How do you bring it within the excepting part? Can the room in question be said to be a part of the factory used solely for the manufacture of goods made of leather?] It is a part not used for the manufacture of webbing, but merely for preparing the leather to be added to that which had already been manufactured in another part, or purchased elsewhere. The object of the Act is, to prevent children from being employed in close proximity to machinery. The statute is a highly penal one; and the Court will not unnecessarily extend its construction. The case is clearly not within the mischief. [WILLIAMS, J.—If the establishment had consisted merely of the manufacture of braces and girths out of materials purchased elsewhere, and the steam or other power were merely employed in putting them together, there might be some foundation for your argument. But, as there is on the premises a manufacturing within the Act, and as the room in question is within the factory, to bring the case within the exception you must show that it is a part used solely for the manufacture of goods made entirely of other materials than those enumerated.] It is not to be expected that there would be two separate and distinct manufactures carried on within the same manufactory. The manufacture the statute means, is, the conversion of the raw material into a marketable fabric, not the mere operation of preparing one fabric to enable it more readily \*159] to be joined to another. \*[WILLES, J.—What do you suggest to be the ground of the exception?] The object was to meet such a case as this, where a portion of the premises is devoted to the doing of something which is wholly unconnected with machinery. [WILLES, J.—I should have thought the object was to remove the temptation of using the hands of children to keep pace with steam-power, which never tires. BYLES, J.—The appellant is a manufacturer,—1. of webbing for braces and girths, 2. of the brace-ends of leather, 3. of the complete braces and girths; which last comprehends the two former.] The words of the statute are "mixed" (not

sewn) "with any other material." [BYLES, J.—"Or any fabric made thereof."]

*Welsby* (with whom was *The Attorney-General*), for the respondent.—It is conceded that this is a "factory;" and it must also be conceded that the "room" falls within the enacting part of the clause. The whole question turns upon the excepting part,—“but this enactment shall not extend to any part of such factory used solely for the manufacture of goods made entirely of any other material than those herein enumerated.” [WILLES, J.—The word "wherein," in the enacting part, I presume, refers to "factory."] It is ambiguous: it may refer either to "factory" or to "room." We may assume that it refers to "room." [WILLIAMS, J.—Nothing is done in the room which makes it a factory.] The statement in the case is in substance this:—On the right-hand side of the square, within the outer gates and boundary, and within the close and curtilage of the same buildings, the manufacture of braces and girths is carried on in rooms entered from the square. The boy Heeley was engaged in the last-mentioned manufacture. His occupation was the preparation of the pieces of leather (for the ends of braces and girths) \*by boring [\*160 holes round the edges with an awl. No part of the webbing was ever placed in his hands or brought into the room: and there was no machinery in the room. Other children were probably employed in other parts of the factory in sewing these leather ends to the webbing. If this case be within the excepting part of s. 73, the Act might always be evaded by employing some of the children in one process in room A., others in a second process in room B., and others in a third in room C. [WILLES, J.—The Act deals with entireties.] Exactly. What is the manufacture which the appellant carries on? The manufacture of braces and girths. The child was employed in a process incidental to the manufacture, which is the combination of all the several processes in which results the production of the marketable article.

*Harrington* was heard in reply.

WILLIAMS, J.—Mr. *Harrington*, after a very able and ingenious argument, was driven by his own good sense to admit that the point at last resolved itself into the question whether this case comes within the exception in the interpretation clause of the 7 & 8 Vict. c. 15, s. 73, which, after declaring that "the word 'factory' shall be taken to mean all buildings and premises situated within any part of the United Kingdom wherein or within the close or curtilage of which steam, water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incidental to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material or any fabric made thereof," and saying, that "any room situated within the outer gate or boundary of any \*factory wherein children or young persons are employed [\*161 in any process incidental to the manufacture carried on in the factory, shall be taken to be a part of the factory, although it may not contain any machinery," goes on,—“but this enactment shall not extend to any part of such factory used solely for the manufacture of goods made entirely of any other material than those herein enume-

rated." Is this case within that exception? It seems to me to be plain that the room in question is not "a part of the factory used solely for the manufacture of goods made entirely of some other material than those enumerated," within the contemplation of the Act. And upon that short ground I am of opinion that the general provision in the enacting part must prevail, and consequently that the conviction was right.

The rest of the Court concurring,

Appeal dismissed, with costs.

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DAW, Clerk of the Commissioners of Sewers of the City of LONDON,  
v. THE METROPOLITAN BOARD OF WORKS. *April 28.*

Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the legislature co-exist, the earlier must necessarily be repealed by the later statute.

The 145th section of the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.),† as to the naming of streets and numbering of houses in the city of London, is repealed by the general provision for that purpose contained in the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 141.

THIS was an action brought by the plaintiff, as clerk of the Commissioners of Sewers of the city of London, against the defendants, the Metropolitan Board of Works, for the recovery of 40*s.* damages, for the defendants' having defaced the numbers of the houses in \*162] Fann Street, Aldersgate; and by consent, and under a Judge's order, the following case was stated, without pleadings, under the 42d section of the Common Law Procedure Act, 1852, for the opinion of this Court:—

Fann Street, Aldersgate, is within the city of London, and within the district within and over which the sole power of ordering, designing, making, enlarging, widening, deepening, raising, altering, removing, repairing, cleansing, and scouring of all common sewers, drains, and vaults, and of paving, cleansing, lighting, and improving the several streets, was by the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), declared to be vested in the mayor and commonalty of the city of London, to be executed by Commissioners to be called Commissioners of Sewers for the City of London.

The said Commissioners, acting or assuming to act under the powers conferred by s. 145 of the City of London Sewers Act, 1848, have since the 1st of January, 1856, caused the houses in the said streets to be marked and numbered in the manner which they thought most proper for distinguishing the same, and have caused the said marks and numbers to be affixed to each house and building in the said street.

The Metropolitan Board of Works, assuming to act under s. 141 of the 18 & 19 Vict. c. 120, "An Act for the better local management of the Metropolis," directed that the said houses should be marked with numbers in another manner, and that the numbers affixed by the said Commissioners should be defaced and obliterated, and the numbers directed by their own board should be affixed to the said houses.

The numbers affixed by the Commissioners are consecutive numbers. The board directed that the houses should be distinguished by the odd numbers only being on one side of the street and the even numbers only on the other side. Acting under their said direction, the said board have wilfully caused the numbers \*of the said Commissioners so affixed by them to the said houses to be defaced [\*163 and obliterated, and the substituted numbers directed by them to be marked to the said houses in the place thereof.

The questions for the opinion of the Court were,—

1. Whether the Commissioners of Sewers of the City of London have now authority to number the houses and buildings in the streets in the city under s. 145 of the City of London Sewers Act, 1848?

2. Whether the Metropolitan Board of Works have authority under s. 141 of the 18 & 19 Vict. c. 120, to name streets and number houses in the said city?

3. Whether the orders of the said board as to numbering houses in the said city override the order of the said Commissioners in the same matter?

If the Court should be of opinion in the affirmative on the first question and in the negative on the second and third, judgment was to be entered for the plaintiff for 40s. and costs of suit. If in the affirmative on the first and second, and negative on the third, the like judgment was to be entered. If in the negative on the first, and affirmative on the second and third, judgment was to be entered for the defendants, with costs.

*Hannen*, for the plaintiff(a)—Prior to the year 1855, \*the [\*164 city of London was with regard to a sanatory state under the management of the City of London Sewers Act, 1848, 11 & 12 Vict. c. clxiii. It was an Act for the general local management of the city in respect of paving, lighting, cleansing, &c. By s. 145, the Commissioners were empowered "from time to time to cause to be painted or affixed on a conspicuous part of some house or building at or near each end, corner, or entrance of every street, the name by which such street is to be known, and from time to time to alter the name of any street, with consent of the major part of the owners of houses or buildings therein, and to call it by any other name which they the Commissioners may see fit, and also to cause every house or building in each of the streets to be marked or numbered in such manner as they shall judge most proper for distinguishing the same, which mark or number shall alone be allowed to be affixed to such house or building; and, if any person shall wilfully or maliciously destroy, pull down, obliterate, or deface any such name or number, or any part thereof, or shall affix or paint or set up any name or number different from the name or number directed by the Commissioners, he shall for every such offence forfeit and pay a sum not exceeding 40s.; and it

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the Commissioners of Sewers of the City of London have still authority to number the houses in the streets in the city, under s. 145 of the City Sewers Act, 1848, that section not being repealed:

"2. That the Metropolitan Board of Works have not authority, under s. 141 of the Metropolitan Local Management Act, 1855, 18 & 19 Vict. c. 120, to number houses in the said city:

"3. That the orders of the board do not override the orders of the Commissioners as to the numbering of houses in the said city."

shall be lawful for the Commissioners to obliterate and destroy such name or number so painted or affixed contrary to their order." The Metropolis Local Management Act, 18 & 19 Vict. c. 120, which passed in 1855, was intended to provide for the better sewerage, drainage, &c., of the whole Metropolis, by s. 141 makes a general provision as to naming streets and numbering houses. That section enacts that "it shall be lawful for the Metropolitan Board of Works from time to time to cause to be painted or affixed on a conspicuous part of some house or building at or near each end, corner, or entrance of every \*165] street \*in the Metropolis the *name* of such street, and the board may, where more than one street in the Metropolis is \*called by the same name, alter the name of any or all such streets except one, to any other name which to such board may seem fit, and which may be approved by the Commissioners of Her Majesty's works and public buildings; and, before any name is given to any new street, notice of the intended name shall be given to the said board, and, if there be any street in the Metropolis called or about to be called by the same name, the said board may, by notice in writing, stating that there is already a street in the Metropolis called or about to be called by the same name, and describing the locality thereof, given to the person by whom notice of such intended name was given to them, at any time within fourteen days after receipt of such last-mentioned notice, object to such intended name; and it shall not be lawful to set up any name to any new street in the Metropolis until the expiration of fourteen days after notice thereof has been given as aforesaid to the said board, or to set up any name objected to aforesaid; and the owners or occupiers of houses and buildings in the several streets in the Metropolis shall mark such houses or buildings with such *numbers* or names, for the purpose of distinguishing the same, as the said board may direct or approve, and shall renew the numbers or names of such houses or buildings as often as they are obliterated or defaced; and, if any occupier of any such house or building neglect, for one week after notice from the said board, to mark such house or building with such number or name as the said board may direct or approve, or to renew the number or name thereof as aforesaid, he shall be liable to a penalty not exceeding 40s., and the said board may cause such number or name to be so marked or \*166] renewed, and recover the expense thereof from the \*owner of such house or building in manner hereinafter provided; and, if any person wilfully or maliciously destroy, pull down, obliterate, or deface the name of any street in the Metropolis, or the name or number of any house or building in any such street, or paint, affix, or set up any name to any street, or any name or number of any house or building, contrary to this enactment, he shall for every such offence forfeit a sum not exceeding 40s.; and it shall be lawful for the said board to cause such name or number so painted, affixed, or set up contrary to their directions to be obliterated or destroyed." The contention on the part of the defendants will be that this section by implication repeals the 145th section of the City of London Sewers Act. The whole question turns upon the interpretation clause, s. 250, which enacts, that, "in the construction of this Act, 'the Metropolis' shall be deemed to include the City of London and the parishes and

places mentioned in the schedules A., B., and C. to this Act:" and it goes on "'The City of London' shall be deemed to include all parts now within the jurisdiction of the Commissioners of Sewers for the City of London." [BYLES, J.—It defines the comprehending word, and then defines the comprehended word.] The Court will not hold that affirmative language in a subsequent Act repeals affirmative language in a prior Act, unless they can see clearly that it was so intended. (a) There are many parts of the Act where the word "Metropolis" is used in a sense which necessarily includes the city of London. The preamble states that "it is expedient that provisions should be made for the better local management of the Metropolis in respect of the sewerage and drainage, and the paving, cleansing, lighting, and improvements thereof:" but there is no provision in the \*Act for the paving, lighting, &c., of the city of London; that is still left to be regulated by the City of London Sewers Act, [\*167 1848. The first thirty sections of the Act are devoted to the creation of local corporate bodies, viz. vestries. Sections 31 to 41 create another set of corporations, viz. district boards. These two bodies are separately incorporated by s. 42. Section 43 constitutes a third body, to be called "The Metropolitan Board of Works," of which, by s. 44, three members of the corporation of London are to form part. By s. 68, all sewers, except main sewers, are vested in the vestries and district boards; the main sewers being by s. 135 vested in the Metropolitan Board of Works. There, the word "Metropolis," evidently includes the city of London. The following sections, down to s. 140, deal with the duties of the Metropolitan Board of Works, to be performed extra the city of London. The 143d and following sections apply to general subjects which do not affect the city of London. [WILLES, J.—The 141st section contemplates a general naming and numbering of the streets and houses. The intention of the legislature may have been to give the general control to *one* public body, in order to insure the avoidance of the inconvenience of having several streets of the same name, or several houses in the same street or place bearing the same number.] The 143d section, which regulates the line of buildings, necessarily excludes the city. Section 242, which saves the powers of the city Commissioners of Sewers, enacts that "nothing in this Act shall divest the Commissioners of Sewers of the city of London of any powers or property vested in them in relation to such parts of any of the parishes mentioned in schedule B. to the Act as are within the city of London, nor shall such parts be subject to be rated or assessed by any district board, but shall be subject to all the powers of the \*Metropolitan Board of Works as other [\*168 places in the city of London." [WILLES, J.—You would say that under that section the Commissioners of Sewers for the city of London must have at least equal powers as to parishes which are wholly within the city as is given to them in respect of parishes which are partly within and partly without the city.] Exactly so. In the clauses which deal with the subject of repealing local Acts, ss. 247, 248, no allusion whatever is made to the city of London. The former enacts, that "all Acts of Parliament in force in any parish or place to

(a) See *Parry v. The Croydon Commercial Gas and Coke Company*, 11 C. B. N. S. 579 (E. C. L. R. vol. 103).

which this Act extends, or in any part of such parish or place, shall, so far as the same are inconsistent with the provisions of this Act, be repealed as regards such parish or place, or such part thereof, notwithstanding any provisions of this Act continuing and transferring respectively to vestries of parishes, and transferring to district boards, any duties, powers, or authorities now vested in vestries, commissioners, or other bodies." And the 248th section, which is a remarkable one, enacts, that, "upon the petition of the Metropolitan Board of Works, or of any district board or vestry, representing to her Majesty in Council, that, by reason of the provisions of any local Act of Parliament relating to any district or parish, or any part thereof respectively, difficulties have arisen in the execution of this Act and of such local Act, or either of them, and praying for a suspension or alteration of all or any of the provisions of such local Act, or for the establishment of other provisions in lieu thereof under this enactment, it shall be lawful for her Majesty, by order in council, to suspend or alter all or any of the provisions of such local Act, and to make other provisions in relation to the matters thereof, as her Majesty, with the advice of her Privy Council, may think necessary under the circumstances \*169] of the case: and every such order in council shall be \*laid before both houses of Parliament within one month after the making thereof, if Parliament be then sitting, or, if Parliament be not sitting, then within one month after the next meeting of Parliament, and shall be published in the London Gazette: Provided always, that no such order in council shall remain in force beyond the term of one year from the making thereof." When the legislature is dealing with the subject of repealing former Acts, it omits all mention of the city of London. [ERLE, C. J.—If the City of London Sewers Act, 1848, is repealed, it must be by s. 250.] In *The London and Blackwall Railway Company v. The Board of Works for the Limehouse District*, 26 Law J., Ch. 164, 166, Vice-Chancellor Wood says: "I think it is quite plain, upon the construction of an Act of Parliament of this special character,(a) that, whenever the legislature has enacted that certain powers of a special character shall be vested in a corporate body, or any body of commissioners, for the express purpose of carrying out a special object which the legislature has in view, no subsequent Act giving in merely general terms powers which by their generality apply to the powers of the special character given by the first Act, will override the special powers so delegated to the particular body of commissioners or corporation. That principle seems to be clearly laid down in the cases which were referred to by Lord Justice Turner in deciding the case of *The Trustees of the Birkenhead Docks v. The Birkenhead Dock Company (or Laird)*, 23 Law J., Ch. 457, 4 De Gex, M'N. & G. 732, and it seems to be a very ancient and settled principle of law. His Lordship says,—23 Law J. 459,—'That appears to be the rule as laid down by the learned Judge Jenkins in *Sir Foulk Grevil's Case*, reported in his work called \*170] *\*Eight Centuries of Reports*, the Third Century, case 41, p. 120, where, speaking of the statute 14 Edw. 3, which ordains that every merchant who ships goods to be exported over sea shall be compelled to find sureties to import two marks in bullion upon his

(a) A railway Act.

return; and then, referring to the Acts of Parliament 45 Edw. 3 and 10 Ric. 2, it was ordained that after three years no new charge should be imposed upon the subject. And then the author says, 'These last general statutes did not repeal the said statute 14 Edw. 3, for it is a special statute;' and further on he adds 'generalia specialibus non derogant.' And he then proceeds to illustrate his position by reference to a statute which was passed to require that a certain tenant in tail shall only make leases for lives, followed by a general public Act enabling tenants in tail to make leases for their lives, and says that this latter 'does not repeal the said Act, for the reason aforesaid.' To this rule of law I entirely assent. I do not find there the distinction which was mentioned in some of the other cases about two statutes of an affirmative character. In the first instance which is given in Sir Foulk Grevil's Case, the second Act was of a negative character, the first Act being special with regard to a particular class of His Majesty's subjects, merchants who were carrying goods abroad, and who were required according to the then principles of interference in trade to bring back a certain quantity of bullion. The reason of the rule, I think, is manifest, namely, that the legislature has wholly in its consideration some special power which is to be delegated to the body applying for the Act of Parliament on public grounds, and the preamble of every one of these Acts contains a recital of its being for the public convenience that these particular powers should be granted: and, when the legislature has had a special case in view and a special public convenience \*resulting from the delegation of those [\*171 powers, the inference is necessary that it does not intend by the general Act to regulate all those cases which have been specially provided for by the legislature; but, looking to the general advantage of the community, without reference to any particular and individual case, it gives certain large and general powers which in their generality might, except for this very wholesome interpretation of the statute, override those powers which they specially, and upon the consideration of the particular case, thought necessary to be exercised in a contrary direction for the benefit of the public." [ERLE, C. J.—What is the provision for raising money for the purposes of the Act?] Sections 170 to 173, which authorize the Metropolitan Board to assess the city of London, and the city Commissioners of Sewers to raise the money by rates. It is not unworthy of remark, that The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), which received the Royal assent on the same day as the Act now under consideration, by s. 14 expressly provides that "nothing therein contained shall affect the exercise of any powers vested by any Act of Parliament in the Commissioners of Sewers of the city of London for the time being."

*Gray*, for the defendants.(a)—So far as the general \*language of the Metropolis Local Management Act goes, the city of [\*172

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the statute 18 & 19 Vict. c. 120, s. 141, gives powers to the defendants which are inconsistent with and cannot be properly exercised, if the powers given to the Commissioners of Sewers for the city of London by the 145th section of the City of London Sewers Act, 1848 (11 & 12 Vict. c. cxliii.), continue in force, and therefore that the former statute impliedly repeals the latter:

"2. That, even if the latter statute be not repealed, the acts charged by the declaration to have been done by the defendants were authorized by the former Act, and therefore were lawfully done."

London must be included: the interpretation clause is clear. The 242d section is relied on as showing that the general powers of the Commissioners of Sewers for the city of London are expressly saved. The object of that section, however, was, to provide for the assessment of such parts of any of the parishes mentioned in schedule B. as are within the city of London. The general scope and object of the Metropolis Local Management Act was, to give to the Metropolitan Board of Works superintending power over the vestries and district boards. These were to have powers within their several districts similar to those before conferred upon the Commissioners of Sewers for the city. The district boards have no power to raise rates from those parts of the parishes comprised in them as are within the city. There is no appeal from the city Commissioners of Sewers, as there is in some cases from the district boards. But, though some of the powers formerly conferred upon the Commissioners of Sewers for the city of London are still preserved to them, it does not follow that this particular function should still exist. It is manifestly for the public convenience that the control over the naming of streets and the numbering of houses throughout the Metropolis should be vested in one body: and there is nothing in the Act which is inconsistent with such a construction. There is no single clause in the Act which the 141st section will clash with if the city of London be held to be included within it. The Metropolitan Board have no power to interfere unless there are two streets bearing the same name. [BYLES, J.—That may show that the legislature did not intend to interfere with the powers of the city Commissioners of Sewers where the Metropolitan Board did not intervene. That, however, does not affect the present question, \*173] \*which relates to the alteration of the numbers only. [WILLES, J.—It seems to me that the order of the Metropolitan Board is final, and overrides the order of the Commissioners of Sewers for the city.]

*Hannen*, in reply.—The 242d section expressly provides that nothing in the Metropolis Local Management Act shall divest the Commissioners of Sewers for the city of London of any powers vested in them. One of the powers vested in them is the power of altering the names and numbers of streets and houses. The question is, whether they lose that power, because a similar power is vested in the Metropolitan Board of Works, which may well be exercised in such parts of the metropolis as are out of the city, without in any way interfering with the powers and privileges of the local Commissioners.

ERLE, C. J.—I am of opinion that the action in respect of which this case is stated may be disposed of by deciding the second and third questions proposed for argument on the part of the plaintiff. It appears that the Commissioners of Sewers for the city of London made an order, under the 145th section of the City of London Sewers Act, 1848, for altering the numbers of the houses in Fann Street, Aldersgate, within the city of London; and that the numbers so put up in pursuance of that order were afterwards, by order of the Metropolitan Board of Works, assuming to act under the authority of the 141st section of the Metropolis Local Management Act, 1860, effaced, and new numbers substituted for them; and it is supposed that the Metropolitan Board of Works have incurred a penalty by so effacing the

numbers put up by the Commissioners of Sewers for the city of London. The real question is whether the Metropolis Local Management \*Act, 1855, overrides and controls the city of London Sewers Act, 1848, where its provisions are inconsistent with those of [\*174 that Act. Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the legislature co-exist, the earlier must necessarily be repealed by the later statute. The purpose of numbering houses is, to distinguish them from each other; and, if the Commissioners of Sewers of the city of London and the Metropolitan Board of Works had each the power to alter the numbers, that purpose would be frustrated. I am therefore of opinion that the two powers cannot co-exist, and that the Act of 1855 overrides that of 1848, and consequently that the Metropolitan Board of Works are not liable to the penalty sought to be enforced against them because they have, in the exercise of the powers conferred upon them by the 141st section of the Metropolis Local Management Act, altered the numbers which had been put up under the directions of the local Commissioners. That affords an answer to the second question which is put to us in this special case, viz., "whether the Metropolitan Board of Works have authority under s. 141 of the 18 & 19 Vict. c. 120, to name streets and number houses in the city of London." The 141st section of the last-mentioned Act enacts in express terms that it shall be lawful for the Metropolitan Board of Works to cause the houses in every street in the Metropolis, to be numbered as they shall think fit. The question, then, is, are the streets of the city of London within the Metropolis? That question, as it seems to me, is answered by the 250th section of the Metropolis Local Management Act,—the interpretation clause,—which enacts, that, "in the construction of this Act, 'the Metropolis' shall be deemed to include the city of London," &c. It seems to me therefore to follow that the Metropolitan Board of Works \*have authority to renumber all the streets in the city of Lon- [\*175 don. It was contended on the part of the plaintiff that the 242d section,—which enacts that "nothing in this Act shall divest the Commissioners of sewers of the city of London of any powers or property vested in them in relation to such parts of any of the parishes mentioned in schedule B. to the Act as are within the city of London, nor shall such parts be subject to be rated or assessed by any district board, but shall be subject to all the powers of the Metropolitan Board of Works as other places in the city of London,"—is consistent with the conclusion we have come to. But I think the explanation of that section given by Mr. Gray is the proper one: that section applies to parishes which are partly within and partly without the city of London, and so subject to the control of the Metropolitan Board of Works: it is a provision, that the powers and property of the city Commissioners as to sewers shall continue with regard to such parts of those parishes as are locally situated within the city, and that the district boards created by that Act shall have no power to rate or assess those parts, though they are in all other respects to be subject to all the powers of the Metropolitan Board of Works as other places in the city of London. The meaning of that seems to be this, that those parts of the parishes which are without the city are in respect of rating or

assessment to be governed by the district boards, and those within the city by the city Commissioners of Sewers; but that the whole shall in other respects be subject to the control and jurisdiction of the Metropolitan Board of Works. In respect of some of the powers contained in their Act, the jurisdiction of the Commissioners of Sewers for the city of London is preserved: but, in respect of certain general \*176] matters, the whole is expressly brought within the \*jurisdiction of the Metropolitan Board of Works: and I think that the 141st section does give the metropolitan board a general authority over the whole of the Metropolis, including the city of London. The 170th section, which enables the Metropolitan Board of Works to make assessments upon the city of London as well as upon other parts of the Metropolis, for defraying the expenses incurred in the execution of the Act, seems to be rather confirmatory of this view,—though the rate is to be levied by the local Commissioners. The observations which I have made upon the second question apply equally to the third, which is, “whether the orders of the Metropolitan Board of Works as to numbering houses in the city override the orders of the Commissioners of Sewers of the city in the same matter.” My judgment I confine to answering these two questions. It would be extrajudicial to answer the first question. When the Metropolitan Board of Works choose to interfere in a matter which is intrusted to them by the general Act, the city Commissioners are subject to the metropolitan board. But, whether a concurrent jurisdiction is given to the city Commissioners, where the metropolitan board have not chosen to exercise their powers, is a question upon which it will be our duty to pronounce an opinion when the point is properly presented to us.

WILLES, J.—If by the first question it was intended to ask the Court whether the Commissioners of Sewers for the city of London have still a certain authority, though an authority subordinate to that which is given by the Metropolis Local Management Act to the Metropolitan Board of Works,—that question does not arise in this case. I can, however, only understand the parties as asking us whether \*177] the Commissioners \*of Sewers of the city of London have now the unlimited and uncontrolled power which they had before the passing of the last-mentioned Act. So understanding the question, my answer is that they have not; because the 141st section of the Metropolis Local Management Act, read in conjunction with the interpretation clause, s. 250, does give the Metropolitan Board of Works jurisdiction to alter the names and numbers of all the streets (subject to a certain condition) and houses of the whole Metropolis, including those situate within the city of London. If the Commissioners of Sewers of the city of London retain any authority under the 145th section of the Act of 1848, it is subordinate and subservient to that of the Metropolitan Board of Works, and cannot be exercised in opposition to it. The first question, so understood, ought, I think, to be answered in the negative. I abstain, with my Lord, from answering the question in the form in which it is presented to us; an answer not being necessary. As to the second question,—whether the Metropolitan Board of Works have authority under s. 141 of the 18 & 19 Vict. c. 120, “to name streets and number houses in the city of

London,"—that I have answered by the observations I have already made. The third question is, "Whether the orders of the board as to numbering houses in the city of London override the orders of the Commissioners of Sewers of the city in the same matter." That question also I have already answered. In truth, when the argument of Mr. *Hannen* (who contends that all the powers which the Commissioners of Sewers of the city of London before had within the city are still preserved to them), is attended to, it will be seen that the only section to which he could have recourse for showing that "Metropolis" in s. 141 does not mean the whole of the Metropolis including the city of London, was the 242d section, which makes \*an [\*178 express provision with respect to parts of parishes which are within the city, other parts being without, that those parts that are within the city shall not be taken from under the authority and jurisdiction of the Commissioners of Sewers of the city. But that section goes on to say that such parts "shall be subject to all the powers of the Metropolitan Board of Works as other places in the city of London." That, therefore, throws us back upon the question, what are the powers of the Metropolitan Board of Works? They are, amongst others, those which are conferred upon them by the 141st section, viz., to name and number all the houses in the Metropolis; and as, by the interpretation clause, s. 250, "the Metropolis" is to be deemed to include the city of London, their power in this respect necessarily extends over the city of London. I think it is impossible to put any other construction upon the Act. The rule of construction of Acts of Parliament as laid down by Vice-Chancellor Wood in *The London and Blackwall Railway Company v. The Board of Works for the Limehouse District*, 26 Law J., Ch. 164, is no doubt a very wholesome one. A subsequent general enactment will not derogate from a prior special enactment. When, as the learned Judge says, the legislature has had a special case in view, and has specially legislated upon it, the inference necessary is that it does not intend by a subsequent general enactment not referring to the former to deal with those matters which have already been specially provided for. The rule *Generalia specialibus non derogant* is properly applied to such a case. In that case, the Blackwall Railway Company, by the 4th section of their Act 18 & 19 Vict. c. xc., which received the Royal assent on the 26th of June, 1855, were empowered, subject to the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. 20), to alter and enlarge their \*works according to certain places and books [\*179 of reference deposited with the clerks of the peace of the county of Middlesex and the city of London; and the board of works for the Limehouse district, constituted under the Metropolitan Local Management Act, which passed subsequently to the London and Blackwall Railway Act, 1855, objected that the building of a proposed new station would project into the Commercial Road beyond the regular line of buildings as fixed by the Metropolitan Board of Works, and that the consent of that board to the erection had not been obtained, and called upon the Company to pull down or set back the new building in a line with the regular line of buildings in the road, as determined by the metropolitan board, and gave notice that, in default thereof,

they (the local board) would cause the building to be demolished, under the 143d section of the Metropolis Local Management Act. The Vice-Chancellor granted an injunction to restrain them from so doing. In the present case, however, that rule cannot apply. The same objects are dealt with in both Acts of Parliament. The powers conferred by the two are substantially, if not strictly, the same. So soon as you find the legislature is dealing with the same subject-matter in both Acts, so far as the later statute derogates from and is inconsistent with the earlier one, you are under the necessity of saying that the legislature did intend in the later statute to deal with the very case to which the former statute applied. I therefore entirely agree with my lord that the question is reduced to this,—does the 141st section of the Metropolis Local Management Act, aided by the light thrown upon it by s. 250, override and control the 145th section of the City of London Sewers Act, 1848? It appears to me that it does, and therefore that our judgment in this case should be for the defendants.

\*180] **BYLES, J.**—I am of the same opinion. I agree with my Lord and my Brother Willes that the first question is hypothetical, and raises a point which it is unnecessary to answer for the purpose of disposing of this case. I therefore give no opinion upon it. As to the second question, I must confess, that, as soon as Mr. *Hannen* had called our attention to the language of the interpretation clause, and to the latter part of s. 242, all doubt vanished from my mind, that, under the 141st section of the Metropolis Local Management Act, the Metropolitan Board of Works had power to name streets and number houses in the city of London in the manner prescribed by that section. With regard to the third question,—whether the order of the Metropolitan Board of Works as to numbering houses in the city of London overrides the order of the Commissioners of Sewers of the city of London in the same matter,—if the order of the last-named body be inconsistent with that of the former body, the general rule must prevail, that a prior Act is repealed by a subsequent Act whose provisions are inconsistent with those of the former Act. That being so, the defendants are entitled to judgment.

**KEATING, J.**—I also agree, for the reasons already expressed, that the defendants are entitled to the judgment of the Court.

Judgment for the defendants.

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\*181] **\*COLBRON and Others v. TRAVERS.** *April 26.*

A. in 1807 (when the old income-tax Act, 46 G. 3, c. 65, existed) leased premises to B., at a rent of 340*l.*, with a proviso that the rent should be reduced to 330*l.* in the event of “the said tax called income-tax” becoming repealed, annihilated, or suspended at any time during the continuance of the demise; such reduced rent to continue to be paid only so long as the income-tax should remain repealed and not payable:—Held, that the rent which had so become reduced on the expiration of the old income-tax, was restored to the original amount on the passing of the new income tax Act, 5 & 6 Viet. c. 35,—there being nothing in the 73d section of that Act to render the covenant illegal.

THIS was an action brought by the plaintiffs to recover the sum of 185*l.* under the circumstances hereinafter mentioned; and by consent

and under a Judge's order the following case was stated in accordance with the provisions of the Common Law Procedure Act, 1852, for the opinion of the Court, without pleadings:—

By indenture dated the 27th of February, 1807, and made between Matthew Place of the one part, and James Spring of the other part, a house and premises, being No. 17 Portland Place, were demised by the said Matthew Place to the said James Spring for a term of sixty-three years from the 29th of September, 1807, at the rent of 340*l.* per annum.

The following is a copy of the reddendum clause in the lease,—  
 “Yielding and paying therefor yearly and every year during the said term unto the said Matthew Place, his executors, administrators, and assigns, the rent or sum of 340*l.* of lawful money of Great Britain (reducible by and upon the contingency hereinafter in that behalf mentioned), free and clear of and from the land-tax and the sewers-rate, and also of and from all and all manner of rates, taxes, duties, charges, assessments, and impositions whatsoever, made, laid, charged, assessed, or imposed, or which shall or may be laid, made, charged, assessed, or imposed upon or for or on account of the said hereby demised premises, or any part or parcel thereof, by authority of Parliament or otherwise howsoever (the property or income-tax always and alone excepted), and to be so paid and payable at and by four even and equal portions and payments, on the 25th day of December, 25th day of March, the 24th day of June, and the 29th day of \*Sep- [\*182  
 tember, in each and every year; and the first payment thereof to begin and be made on the 25th day of December now next en-  
 suing.”

The covenant on the part of the lessee to pay rent and taxes then follows, in the following form:—“And the said James Spring, for himself and his executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said Matthew Place, his executors, administrators, and assigns, in manner following, that is to say, that the said James Spring, his executors, administrators, or assigns shall and will well and truly pay or cause to be paid unto the said Matthew Place, his executors and administrators, or assigns, the said yearly rent or sum of 340*l.* of lawful money of Great Britain, free and clear of and from the King's taxes and the sewers-rate or tax, and also of and from all and all manner of rates, taxes, duties, charges, assessments, and impositions whatsoever, made, laid, charged, assessed, or imposed, or to be made and charged, assessed, or imposed upon or for or on account of the said hereby demised premises, or any part or parcel thereof, by authority of Parliament or otherwise howsoever, and without any deduction or abatement whatsoever (the income-tax or property-tax always and alone excepted, as aforesaid), on the days, and at the times, and in the proportions and manner and form as hereinbefore in that behalf is mentioned: And also that he the said James Spring, his executors, administrators, and assigns, shall and will from time to time and at all times for and during the term and continuance of this present demise, and at his and their own proper costs and charges and expenses, constantly and regularly bear, pay, defray, and discharge the King's taxes and the sewers-rate or tax, and all and singular the rates, taxes, duties, charges, assessments, and inpositions

\*183] made, laid, \*charged, assessed, or imposed, or to be made, laid, charged, assessed, or imposed upon or for or on account of the said hereby demised premises, or any part or parcel thereof, by authority of Parliament or otherwise howsoever, the said tax called the income or property-tax always alone excepted, as aforesaid."

In a subsequent part of the lease occurs the following proviso and covenant for quiet enjoyment:—"Provided always, and it is hereby declared to be the true intent and meaning of these presents, and the said Matthew Place, for himself and his executors and administrators, doth hereby further covenant and agree, that, if the said tax called the income or property tax shall become and be repealed, annihilated, or suspended, and not paid or payable at any time or times during the term and continuance of this demise, then, upon every or any such occasion, and from time to time when, and for and during so long time as, the said tax shall be and remain repealed and not paid or payable as aforesaid, but no longer, the said yearly rent or sum of 340*l.* hereinbefore reserved shall be and remain reduced unto the yearly rent or sum of 330*l.*, payable at and by four even and equal portions and payments on the days and times and in manner as aforesaid; anything herein contained to the contrary thereof in anywise notwithstanding: And the said Matthew Place, for himself and his executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said James Spring, his executors, administrators, and assigns, in manner following, that is to say, that he the said James Spring, his executors, administrators, and assigns, paying the said yearly rent or sum of 340*l.* of lawful money of Great Britain, reducible as aforesaid, upon the days and times and in the proportions and manner and form aforesaid, and, according to the true intent and

\*184] \*meaning of these presents, well and truly observing, fulfilling, and keeping all and singular the covenants, provisoes, and agreements hereinbefore contained or mentioned, shall or lawfully may have, hold, use, occupy, possess, and enjoy the said messuage or tenement and premises hereby demised, and every part and parcel thereof, with the appurtenances, for and during the said term of sixty-three years hereinbefore mentioned, without any lawful let, suit, trouble, hindrance, molestation, or interruption of or from or by him the said Matthew Place, his executors, administrators, or assigns, or any other person or persons whomsoever lawfully and equitably claiming or to claim by, from, through, or under him, them, or any or either of them."

The property or income-tax which was payable at the time when the said lease was executed, was imposed by the Act of 46 G. 3, c. 65; and that tax ceased upon the restoration of peace in the year 1815, from which time to the present the tenant and his assigns of the lease for the time being have paid to the landlord the reduced rent only of 330*l.*

By the statute 5 & 6 Vict. c. 35, a property or income-tax was imposed as provided by that Act; and taxes on property or income have since from time to time been imposed by other Acts of Parliament, at varying amounts of charge; and the tax for the time being in force has been payable in respect of the said house and premises.

The plaintiffs in this action are the owners of the reversion expect-

ant upon the determination of the said lease, and, as such, entitled to whatever rent has been from time to time payable thereunder: and the defendant is the assignee of the lease, and bound to pay the rent to the plaintiffs, whatever the amount may be.

\*The plaintiffs contend, that, from the time when the 5 & 6 Vict. c. 35 came into operation, the full rent of 340*l.* has been [\*135 payable; and they have made a claim on the defendant accordingly for 185*l.*, being the difference between the rent which has been paid and the full rent of 340*l.* for eighteen years and a half since the statute 5 & 6 Vict. c. 35 came into operation.

The question for the opinion of the Court was, whether, during the whole or any part of the said last-mentioned period, the full or the reduced rent has been payable.

If the full rent, the judgment was to be entered for the plaintiffs for 185*l.*, or any smaller sum to which the Court might consider them entitled; if the reduced rent, the judgment was to be entered for the defendant. In either case the costs were to follow the event.

*Garth*, for the plaintiffs.—The income and property-tax imposed by the statute 5 & 6 Vict. c. 35, was virtually a renewal of the tax imposed by the 46 G. 3, c. 65, which ceased or became suspended at the close of the war, in the year 1815. And, according to the true construction of the lease of 1807, the rent payable by the lessee was to be 340*l.* whenever any property or income-tax similar in character to that which then existed was in force; and the tax which was imposed by the 5 & 6 Vict. c. 35, was a tax of a similar character to the tax existing in 1807.

*Bovill*, Q. C. (with whom was Mr. *Milward*), *contra*.(a)—\*The [\*186 property-tax Act in force at the time of this contract was the 46 G. 3, c. 65. The tax imposed by that Act was not a yearly tax; nor was it perpetual; but only “during the present war, and until the 6th day of April next after the ratification of a definitive treaty of peace.” That tax ceased in 1815; and no income or property-tax was again imposed until the year 1842. The tax referred to in the covenant in question is, the tax then existing under the 46 G. 3, c. 65, which has never been revived. Under the new Act, a covenant shifting the burthen from the landlord to the tenant is strictly prohibited. The 73d section of the 5 & 6 Vict. c. 35 provides that “no contract, covenant, or agreement between landlord and tenant or any other persons, touching the payment of taxes and assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon under this Act; nor be binding contrary to the intent and meaning of this Act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this Act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants, and agreements.” [BYLES, J.—This is not in terms a contract

(a) The points marked for argument on the part of the defendant were as follows:

“That the tax contemplated by the lease terminated, and has never been revived; and that the duty latterly imposed by the Acts of Parliament referred to in the case is not in law or in the language of lawyers, or within the meaning of the provision of the deed, the same tax as existed in 1807.”

affecting the payment. It is merely a bargain, that, in the event of a certain charge coming upon the landlord, the tenant shall pay a larger rent.] The policy of the Act was to prevent the insertion of any such covenants in leases.

*Garth*, in reply.—There is nothing in the 73d section of the 5 & 6 Vict. c. 35 to affect this case. The property-tax is excepted out of the *reddendum*. *Cur. adv. vult.*

\*187] \*WILLES, J., now delivered the judgment of the Court: (a)—

We are of opinion that our judgment in this case should be in favour of the plaintiffs. It was an action founded upon a lease made in the year 1807, when the income-tax which expired soon after the termination of the war of 1815, was in existence. The lease contains a reservation of a rent of 340*l.* (reducible by and upon the contingency thereafter in that behalf mentioned,) free and clear of and from the land-tax and the sewers-rate, and also of and from all and all manner of rates, taxes, duties, charges, assessments, and impositions whatsoever, made, laid, charged, assessed, or imposed, or which shall or may be laid, made, charged, assessed, or imposed upon or for or on account of the said thereby demised premises, or any part thereof, by authority of Parliament or otherwise howsoever (the property or income-tax always and alone excepted)." Then there is a proviso, that, "if the said tax called the income or property tax shall become and be repealed, annihilated, or suspended, and not paid or payable at any time or times during the term and continuance of this demise, then, upon every or any such occasion, and from time to time when, and for and during so long time as, the said tax shall be and remain repealed and not paid or payable as aforesaid, but no longer, the said yearly rent or sum of 340*l.* hereinbefore reserved shall be and remain reduced unto the yearly rent or sum of 330*l.*" The rent is to be 340*l.* per annum so long as there is such a tax in existence, and 330*l.* while there is none. It appears that during the period which has elapsed since the year 1842, when the statute passed imposing the

\*188] existing income-tax, down to the present time, the lessee \*had paid the lessor rent of 330*l.*, which became payable on the expiration of the former income-tax; and this action is brought by the landlord in assertion of his right to claim the higher sum. Upon comparing the Act of Parliament relating to income-tax in force at the date of the lease, viz., the 46 G. 3, c. 65, with the 5 & 6 Vict. c. 35, it seems to us that the tax now in existence is clearly of the same kind and character as that referred to in the lease; and we also think it clear that the lease could not mean to refer to the tax then existing only, but that it must have been intended to refer to periods when by reason of future Acts of Parliament there should exist an income-tax of the same kind. That being so, unless there is some illegality in the covenant for the increase of the rent during the period for which the premises should be charged with an income or property-tax, the landlord is entitled to be paid the larger rent stipulated for. On the part of the defendant, it is contended that the contract is illegal, as being in substance a violation of the 73d section of the 5 & 6 Vict. c. 35, and of the corresponding section (s. 115) of the 46 G. 3, c. 65. Those sections provide in substance that all contracts whereby the

(a) The judges present at the argument were, Erle, C. J., Willes, J., Byles, J., and Keating, J.

tenant agrees that the property-tax charged upon the premises shall be borne and paid by him, and that the landlord shall be exempt, shall be void. The covenant under consideration provides for an increase of the rent in the event of a property or income tax being paid by the landlord. Upon consideration, we do not think that it is a contract in violation of the statute. Every landlord is entitled to get as much rent as he can for his house; and if he does not stipulate that his tenant shall be charged with the payment of a tax which the law intended to impose upon the landlord, but merely provides for an increase of his rent as such in the event of a certain tax coming \*upon him, he is doing something for which the Act of Parliament has not provided. There is direct authority for this view, [\*189 and that of the highest character, in a case which arose upon Lord Stanley's Act, the Irish Tithe Commutation Act, 2 & 3 W. 4, c. 119, which contains as stringent a provision as that of the Act now in question, viz., that, "in all cases where any land shall be let or set or demised in Ireland, the lessee or tenant thereof shall hold such land free from the payment of tithes or composition for tithes; and all contracts, covenants, and agreements to the contrary hereof, howsoever made, shall be utterly null and void:" s. 13. But Lord St. Leonards, before whom this very point arose, and by whom it was considered, was of opinion that a suggestion of the tenant, assented to by the landlord, that an increased rent should be paid for the land in consideration of the burthen of the tithe rent-charge imposed upon the landlord, did not constitute an illegal bargain within that statute. It is clear from the reasoning of that learned Judge that in his opinion it would be a valid contract. I refer to the case of *Davies v. Fitton*, 2 Drury & Warren 225, where the Lord Chancellor, in giving judgment, says: "The single question which now remains to be considered is this, whether, upon the true construction of these articles of agreement, the tenant was bound to the payment of the tithe rent-charge. No doubt, independently of the statute, he was bound to pay the tithe, which is part of the produce which he takes from the land, and is a natural burthen on the tenant. But the effect of the statute was, to place the matter on a different footing: it provided that no tenant, except under the peculiar circumstances mentioned in the Act, should be liable to pay this demand, and transferred the liability to the landlord or the person who is seised of an estate of inheritance as defined in \*the statute; on the other hand, however, the Act does not [\*190 prevent the landlord saying 'I must have a greater rent than I formerly received, in consequence of the new obligation imposed on me by this statute.' Every man may take the largest rent people will give him. He may, notwithstanding the statute, by contract, get a rent equivalent both to the old rent and the tithe." Again, at a subsequent part of the judgment, he says: "If a lease be granted subject to a gross rent, with a collateral covenant by the tenant to pay the tithe rent-charge, that agreement would be void under the statute. But, suppose an agreement of this nature,—the tenant offers to pay 100*l.* a year rent, and, in consideration of the tithe rent-charge, an additional sum of 5*l.* a year, and this offer is accepted by the landlord. If this Court were called upon to carry into execution such an agreement, could it refuse to do so? I certainly can see nothing to

prevent its doing so. I apprehend that the Court would have no difficulty in so modelling the contract as to make the tenant liable to an entire rent of 105*l*. There is nothing illegal in such a contract, and by so executing it the Court would act according to the spirit of the contract." There, Lord St. Leonards was dealing with a case where the landlord was stipulating for an increased rent in consideration of the additional burthen cast upon him by the statute, just in the same way as the burthen is imposed here. Both upon authority and upon the reason of the thing, therefore, we are of opinion that the plaintiffs are entitled to judgment. Judgment for the plaintiffs.

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\*EYRE v. FORBES. *May 2.*

A contract for the payment of money in consideration of the resignation of a majority in the service of the East India Company, is illegal by the 49 G. 3, c. 126.

THE first count of the declaration stated that the plaintiff, before and at the time of the committing of the grievances thereafter mentioned, was an officer in the service of the Honourable East India Company, holding the rank of major in the 3d regiment of light cavalry of the said Company; yet that the defendant falsely and maliciously wrote and published of the plaintiff, and of and concerning him as such major and officer as aforesaid, a letter in the words and figures following, that is to say, "Captain Forbes, commanding 3d regiment Light Cavalry, Bombay, Camp, Asseer. December 27th, 1857. To the adjutant-general of the army,—Sir, it is with extreme reluctance that I (meaning the defendant) feel it my duty to request that the following circumstance may be laid before his excellency the commander in chief: but no other alternative is open to me. In August, 1851, Major Walter retired from the regiment (meaning the 1st regiment) now under my command, for the sum of Rs. 47,000: of this sum Major Eyre's share was Rs. 5200; and, in common with the other officers of the regiment (meaning the aforesaid regiment), he (meaning the plaintiff) signed a bond for the amount advanced by the Agra Bank, as a loan advanced on the occasion in question. Three years was the period named in the bond for the gradual liquidation of the debt by instalments. Upwards of six have elapsed, and Major Eyre (meaning the plaintiff), although repeatedly addressed on the subject, has not paid a single rupee of his share. The 5200 Rs., his original share, now amounts to upwards of 10,000 rupees, from the accumulation of interest at 10 per cent. per annum: and is of course

\*192] \*daily increasing, from the same cause. In the event of Major Eyre's death, or at any period the Agra Bank may choose, the officers of this regiment may be sued at law by the bank on account of their joint liability in the bond, as Major Eyre's co-securities; and, as the period originally fixed by the bank for the repayment of the loan has long since expired, such a course may be expected at any moment.

"The original letters addressed to Major Eyre (meaning the plaintiff) by the officers of the regiment, to urge his paying his share without

further delay, are now at Rajkote: and I am unable, therefore, to forward copies for his excellency's information; but, in justification of the course I am now compelled to adopt, I beg to forward copies of a correspondence that ensued a year ago between the late Col. Malet, of this regiment, and Major Eyre (meaning the plaintiff) on the debt in question, and also a letter from the secretary of the Agra Bank to the address of Captain Wren, of the regiment under my command. These letters will, I trust, make the facts of the case sufficiently obvious, without any further explanation from myself, beyond the remark that a year has since elapsed and the debt has of course proportionately increased. I have the honor to be, &c. (signed), J. FORBES, Captain Commandant 3d Regiment Light Cavalry." Averment, that, by means of the premises, the plaintiff's character and reputation as an officer aforesaid in the said service was greatly injured, insomuch that the plaintiff was compelled to retire from and leave the said service of the said Company upon other and less advantageous terms than he otherwise would have done, and lost thereby the command of his said regiment, and all the pay and advantage thereof which he otherwise but for the premises would have of right derived and obtained, and the benefit of a \*contract between him and the officers of the said regiment whereby the said officers were to pay and the plaintiff [\*198 was to receive the sum of 47,000 rupees from the said officers as the price of his voluntary retirement from the said service of the said Company; and that the plaintiff was otherwise greatly damnified.

The second count stated, that, therefore and whilst the plaintiff was such officer in the aforesaid regiment and in the said service of the said Company, whereby he derived great gains and profits, it was agreed between the plaintiff and the defendant, that, in consideration that the plaintiff would retire from the said service of the said Company, he the defendant would pay or cause to be paid to the plaintiff a certain sum then agreed upon, to wit, 40,000 rupees: Averment, that the plaintiff had in all things performed the said agreement on his part, and all things had been done, and all times elapsed, necessary to entitle him to the payment of the said sum of 40,000 rupees; yet no part thereof had been paid.

The plaintiff demurred to the second count, the ground stated in the margin being, "that the alleged agreement is illegal and void." Joinder.

*Bovill*, Q. C. (with whom was *Mathew*), in support of the demurrer.(a)—The contract declared on in the second count is clearly a contract within the 5 & 6 \*Ed. 6, c. 16, and the 49 G. 3, c. [\*194 126. The first section of the former Act prohibits the sale

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the alleged contract is a contract to pay money to the plaintiff for the resignation of an office, commission, place, or employment, within the language and meaning of the 49 G. 3, c. 126, s. 3:

"2. That the plaintiff alleges himself to have been an officer in the service of the East India Company, and his retirement from such service to be the consideration for the defendant's promise; and the statute applies to all offices, commissions, &c., belonging to or under the appointment or control of the East India Company:

"3. That, in extending by statute 49 G. 3, c. 126, the Act of 5 & 6 Ed. 6, c. 16, to the East India Company's service, the obvious intention of the legislature was, to apply both Acts as extensively to the service of the East India Company as to the service of the Crown, subject to the exception as to the sale of commissions in his Majesty's forces contained in the 7th section."

of a great number of offices therein enumerated; and the latter Act extends the prohibition (by s. 1) to *all* offices in the gift of the Crown, and also to "all offices, commissions, places, and employments belonging to or under the appointment or control of the united Company of merchants of England trading to the East Indies, in as full and ample a manner as if the provisions of the said Act were repeated as to all such offices, commissions, places, and employments, and made part of this Act." And the 3d section enacts, that, from and after the passing of this Act, if any person or persons shall sell or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond, or assurance, or shall by any way, device, or means, contract or agree to receive or have any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, and also if any person or persons shall purchase or bargain for the purchase of, or give or pay any money, fee, gratuity, loan of money, reward, or profit, or make or enter into any promise, agreement, covenant, contract, bond, or assurance to give or pay any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any office, commission, place, or employment specified or described in the said recited Act or this Act, or within the true

\*195] *\*intent or meaning of the said Act or this Act, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents or voice or voices of any person or persons to such appointment, nomination, or resignation, then and in every such case every such person, and also every person who shall wilfully and knowingly aid, abet, or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor.*" And the 4th section enacts, that, "from and after the passing of this Act, if any person or persons shall receive, have, or take any money, fee, reward, or profit, directly or indirectly, or take any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract, or agree to receive or have any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any interest, solicitation, petition, request, recommendation, or negotiation whatever made or to be made, or pretended to be made, or under any pretence of making or causing or procuring to be made any interest, solicitation, petition, request, recommendation, or negotiation, in or about or in any wise touching, concerning, or relating to any nomination, appointment, or deputation to or resignation of any such office, commission, place, or employment as aforesaid, or under any pretence for using or having used any interest, solicitation, petition, request, recommendation, or negotiation in or about any such nomination, appointment, deputation, or resignation, or for the obtaining or having obtained the consent or consents or voice or voices of any person or persons as aforesaid to such nomination, appointment, deputation, or resignation; and also if any person or persons shall give or pay or cause or procure to be given or paid any money, fee,

\*196] *gratuity, \*loan of money, reward, or profit, or make or cause or procure to be made any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract*

or agree to give or pay or cause or procure to be given or paid any money, fee, gratuity, loan of money, reward, or profit, for any solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, that shall in any wise touch, concern, or relate to any nomination, appointment, or deputation to or resignation of any such office, commission, place, or employment as aforesaid, or for the obtaining or having obtained, directly or indirectly, the consent or consents or voice or voices of any person or persons as aforesaid to any such nomination, appointment, deputation, or resignation; and also if any person or persons shall, for or in expectation of gain, fee, gratuity, loan of money, reward, or profit, solicit, recommend, or negotiate, in any manner for any person or persons in any matter that shall in any wise touch, concern, or relate to any such nomination, appointment, deputation, or resignation aforesaid, or for the obtaining, directly or indirectly, the consent or consents or voice or voices of any person or persons to any such nomination, appointment, or deputation or resignation aforesaid, then and [in] every such case every such person, and also every person who shall wilfully and knowingly aid, abet, or assist such person therein, shall be deemed and adjudged guilty of a misdemeanour." In *Græme v. Wroughton*, 11 Exch. 146,† it was expressly decided that the resignation for a pecuniary consideration of the position of major in a regiment in the East India Company's service, is illegal by the 49 G. 3, c. 126, s. 4, and that a security for the payment of the money is void. It is impossible to distinguish that case from the present.

\**Garth, contra.*(a)—In *Græme v. Wroughton*, the facts showing the illegality were all brought out on admissions or in evidence. Here, the record is a blank. If, therefore, any state of facts can be assumed in which the contract declared upon in the second count could be lawful, the Court will assume them. There is nothing to show that the resignation which was the consideration for the defendant's promise to pay the money was not allowed by the rules of the service, or that a \*majority is not legally saleable. [ERLE, C. J.—A majority is a commission within the meaning

(a) The points marked for argument on the part of the plaintiff were as follows :—

"1. That the contract disclosed by the second count is neither contrary to the statute nor against public policy, and that it is founded on a sufficient consideration :

"2. That it nowhere appears that the contract was a corrupt bargain or a contract for relinquishing or obtaining office or employment, or that the plaintiff undertook to do anything contrary to the rules or prejudicial to the service of the East India Company, or that the plaintiff or defendant were British subjects at the time :

"3. That the Court will not presume illegality, and there is nothing on the record to satisfy the Court in any way that the contract was illegal, or that it wanted consideration :

"4. That there was ample consideration for the defendant's promise in the plaintiff's retirement from the service at the defendant's request :

"5. That it is consistent with all that appears that the plaintiff's retirement, though optional, was in strict accordance with the rules of the East India Company's service, and that it was in fact procured by that company :

"6. That there could be no illegality in the plaintiff's retiring from such service even for a pecuniary consideration, in accordance with the company's regulations, or at the instigation of the company :

"7. That the general averment that everything existed and was done to entitle the plaintiff to the money sued for (which stands admitted on the record), excludes illegality and want of consideration :

"8. That no intendment, therefore, can be made against the count, and that every intendment must be made in its support."

of the statute 49 G. 3, c. 126, s. 3. We are bound to take judicial notice of what is saleable. No appointment in the East India Company's service is saleable.] The 9th section of the statute provides that "nothing in this Act contained shall extend or be construed to extend to any office excepted from the provisions of the said Act passed in the sixth year of the reign of King Edward the Sixth against buying and selling of offices, or to any office which was legally saleable before the passing of this Act, and in the gift of any person by virtue of any office of which such person is or shall be possessed under any patent or appointment for his life; or to render invalid, or in any measure to affect, any promise, agreement, covenant, contract, bond, assurance, or trust entered into or declared before the passing of this Act, and which before the passing thereof was a valid promise, agreement, covenant, contract, bond, assurance, or trust, in law or equity, or to any money paid, or to any act, matter, or thing done in pursuance of any such promise, agreement, covenant, contract, bond, or assurance. [BYLES, J.—That proviso is in a distinct part of the Act. It lay upon the plaintiff, therefore, to bring himself within it.] The general averment that all things had been done and happened to entitle the plaintiff to recover, cures that.

ERLE, C. J.—No regulation or rule of the East India Company can repeal the 49 G. 3, c. 126. There must be judgment for the defendant.

The rest of the Court concurring, Judgment for the defendant.

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\*SPENCE v. SPENCE. Feb. 8.

Testator, by a will made subsequently to the 7 W. 4 & 1 Vict. c. 26, after directing that his debts and funeral and testamentary expenses should be paid by his executors as soon as conveniently might be after his decease, devised all his real and personal estate to trustees (whom he afterwards appointed his executors), in trust to pay the rents and proceeds thereof to his son J. S. for his natural life; and, from and after the death of J. S., in trust for the right heirs of him the said J. S. for ever:—Held, that, by reason of the direction to them to pay debts, the trustees took the legal estate in fee, and therefore, inasmuch as the estate for life and the estate in remainder were both equitable estates, the rule in *Shelly's Case* applied, and J. S. took an equitable estate in fee.

THIS was an action of ejectment brought by the plaintiff as heir-at-law of Jonathan Spence the elder, to recover certain freehold property situate in Liddell Street, in the township of North Shields, in the county of Northumberland.

The cause was tried before Martin, B., at the last Summer Assizes for Northumberland. The contention on the part of the plaintiff was, that Jonathan Spence the younger, who had by his will devised the property in question to the defendant, his daughter, took under the will of his father Jonathan Spence the elder only an estate for life, and consequently was incapable of disposing of the property by will.

The will of Jonathan Spence the elder, which bore date the 26th of May, 1844, was as follows:—"I direct my just debts and funeral and testamentary expenses to be paid by my executors hereinafter named, as soon as conveniently may be after my decease. I also direct my executors to deliver to my wife, Mary Spence, such articles

of household furniture and other household effects as she may select and they may think reasonable and proper for her situation in life; and also to deliver to my sister-in-law, Jane Kirkup, now residing with me, such other articles of furniture and effects as she may select and they may think reasonable and proper as aforesaid; and I give and bequeath the same to them for their own use respectively. I give, devise, and bequeath unto my friends, John Rodham, grocer, William Orange, printer, and Samuel Price Holliday, agent, all of North Shields aforesaid, all that my freehold messuage, public-house, and premises, situate in Liddell Street, North Shields aforesaid, now in the occupation of \*William Chapman; also all those my freehold messuages, dwelling-house, shop, and premises, situate in Bedford [\*200 and Savile Street, North Shields aforesaid, now in the occupation of J. McCall, Crossthwaite, and others; and also all and singular other my real and personal estate and effects, goods and chattels, whatsoever and wheresoever,—in trust, as to my said freehold public-house and premises situate in Liddell Street aforesaid, to pay the rents and proceeds thereof, as and when they shall come to their hands, unto my son, Jonathan Spence, for and during the term of his natural life, but without any power for him to appoint or otherwise anticipate such rents and proceeds; and any such appointment or anticipation by him I declare to be null and void; and from and immediately after the death of my said son Jonathan Spence, in trust for the right heirs of him the said Jonathan Spence, for ever." The testator then proceeded to declare the trusts of the other property devised; and, after providing for the appointment of new trustees, and indemnifying the trustees from loss, &c., the will concluded with the appointment of the said John Rodham, William Orange, and Samuel Price Holliday executors thereof.

On the part of the defendant, it was submitted, that the legal estate in fee in the premises in Liddell Street passed to the trustees under the above will, and that Jonathan Spence the younger took an equitable estate in fee, and consequently that it passed to the defendant under his will.

The plaintiff, who claimed as heir-at-law of Jonathan Spence the younger as well as of Jonathan Spence the elder,—alleging that the defendant was illegitimate,—had given evidence to negative the possibility of access on the part of Jonathan Spence the younger at a time corresponding with defendant's birth.

The learned Judge having directed a nonsuit,

\**S. Temple*, Q. C., in Michaelmas Term last, obtained a rule [\*201 nisi for a new trial, "on the ground that Jonathan Spence the younger had no power to devise the property, and that the production of the will of Jonathan Spence the younger did not warrant the Judge in directing the nonsuit." He referred to *Doe d. Leicester v. Biggs*, 2 Taunt. 109, and *Doe d. Gratrex v. Homfray*, 6 Ad. & E. 206 (E. C. L. R. vol. 33), 1 N. & P. 401 (E. C. L. R. vol. 36).

*Manisty*, Q. C., and *T. Jones*, showed cause.—Under this will the legal estate in fee vested in the trustees by reason of the devise to them by directions to pay the rents to Jonathan Spence the younger, and the charge of debts; and Jonathan Spence the younger took an equitable estate for life, with an equitable fee in remainder, which

passed by his will to the defendant: *Shelley's Case*, 1 Co. Rep. 93 b. This view is abundantly supported by authorities. Wherever the will contains a direction to the trustees to pay debts, and devises real estate to the same parties, with trusts in favour of others, the trustees take the legal estate in fee simple. The trust is not at an end even after payment of all the debts. Until the recent Wills Act, it had been a constant and fruitful source of litigation and discussion whether the trustees took a chattel interest or some interest short of a fee for the purpose of paying the debts. [WILLIAMS, J.—Where there were no words of inheritance. One of the leading cases upon the subject was *Cordall's Case*, Cro. Eliz. 316.] The whole of the cases are collected in Jarman on Wills, Vol. 2, ch. 34. The result is thus summed up at p. 295 (3d edit.),—"Here closes the long catalogue of decisions respecting the quality and extent of the estate conferred by devisees in trust, from which the reader will have collected the principles that govern cases of this description, and the considerations \*202] which have been admitted to influence the \* construction, though, as the question is constantly presenting itself under new aspects and combinations of circumstances, difficulty will sometimes occur in the application of the established doctrine. Of all the adjudged points connected with the subject, that which has been deemed the least satisfactory, is, the doctrine of those decisions which, in certain cases, gave to trustees whose estate was undefined a term of years (either with or without a prior estate for life), determinable when the purposes of the trust should be satisfied. To exclude the application of this inconvenient and very refined rule of construction, two enactments have been introduced into the statute 7 W. 4 & 1 Vict. c. 26. The 30th section provides, 'that, when any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.' Section 31 provides, 'that, where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.' These clauses have been the subject of much criticism. It is not \*203] \*easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of the 30th section would seem to be simply to negative the construction which, in certain cases, (a) gave to a trustee an undefined term of years, for,

(a) See *Carter v. Barnardiston*, 1 P. Wms. 505, 2 Eq. Ca. Abr. 224, *Gibson v. Lord Montfort* 1 Ves. sen. 485, *Doe d. White v. Simpson*, 5 East 162, *Heardson v. Williamson*, 1 Keen 33.

it allows him to take an estate of freehold, or a *definite* term of years, either expressly or by implication: but the 31st section takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a church. Its effect is, to propound, in regard to wills made or republished since the year 1837, the following general rule of construction,—that, whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators), for purposes requiring that they should have *some* estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or, being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in *Carter v. Barnardiston*, 1 P. Wms. 505, 2 Eq. Ca. Abr. 224, an estate for years, or, as in *Doe d. White v. Simpson*, 5 East 162, an estate for life, with a superadded term of years, but) an estate in fee-simple. The result, in short, is, that trustees whose estate is not expressly defined by the will, must in every case, *and whatever be the nature of the duty imposed upon them*, take either “an estate for life or an estate in fee.” Independently of the Wills Act, [\*204 wherever the executor was a devisee, if the will contained a direction to him to pay debts, he took a fee: *Awbrey v. Middleton*, 2 Eq. Ca. Abr. 497, pl. 16; *Henvell v. Whitaker*, 3 Russ. 343. The question arose before V. C. Stuart, in 1857, in a case of *Creton v. Creton*, 26 Law J., Ch. 266. The testator by his will desired his debts to be paid, and then devised all his residuary estates to trustees and the survivors and survivor of them, and the heirs of such survivor, upon trust to pay the rents to his wife and two daughters in equal shares, for their respective lives, with survivorship amongst them, and, after their deaths, upon certain trusts for the issue of his said daughters, and, in the event of the deaths of both daughters without leaving issue, then he devised his said copyhold estates to the right heirs of the survivor of his said daughters for ever. The trustees were also appointed executors of the will, to the uses of which (the testator having in his lifetime surrendered to such uses) they were after his death duly admitted as tenants. Both daughters survived the wife of the testator, and died without having been married. Upon demurrer to a bill filed by the customary heirs in gavelkind of the copyholds of the survivor of the daughters, put in by the right heir of such survivor,—it was held that there was a charge of debts created upon the residuary copyholds by the will, and that such charge, coupled with the legal estate devised to the trustees, vested the legal estate in fee-simple in such trustees, and made all the estates limited after the devise to them equitable estates. “The copyhold estates in question upon this demurrer,” says his honour, “were clearly devised to the trustees in fee-simple, subject, however, to a general charge for payment of debts. Being also named executors, the trustees, [\*205 besides the trust of paying the rents to the persons taking equitable life interests in the estates under the will, had also to execute the trust of paying the debts charged upon the estate. If therefore the extent of their interest in the premises was to be commensurate with that which was necessary for a due performance of

their trust, it was impossible to say that such interest must terminate with the equitable life interest given to the tenants for life. The charge or trust for payment of debts required that the trustees should have an absolute dominion for an indefinite time over the estates devised, so as to be able to hand over, if necessary, that dominion to a purchaser. That being the case, it was impossible to hold that the devisee in remainder, the right heir of the survivor of the testator's daughters, could take any more than an equitable estate, the legal fee still remaining vested in the trustees." And see *Goodtitle d. Paddy v. Maddern*, 4 East 496, 1 J. P. Smith 185.

*S. Temple*, Q. C., and *Heath*, in support of the rule.—The plaintiff might have amended at the trial by adding the names of the trustees, as was done in the Court of the Exchequer in the recent case of *Blake v. Done*, 7 Hurlst. & N. 465.† [WILLIAMS, J.—Assuming that that might have been done, in furtherance of the justice of the case, it could only be allowed where the merits would be determined, which would not be the case here. If the legal estate was in the executors, the rule in *Shelly's Case* would apply, and then Jonathan Spence the younger would take an estate in fee.] During the lifetime of Jonathan Spence the younger, there was an active trust in the executors, and the legal estate would necessarily vest in them, to enable them to pay the debts and funeral and testamentary expenses. [WILLIAMS, \*206] J.—We did not know that the \*trustees who were charged with the payment of the debts were the devisees also, or we certainly should not have granted the rule.] Looking at the whole of the will, it is submitted that it is manifest that the testator did not intend that this particular house should be charged with the payment of his debts. There was other property given to the trustees, both real and personal, out of which ample provision might have been made for that purpose. It was manifestly the intention of the testator that his son Jonathan Spence should take all the advantage of the rent of this house during his life; and, on his death, the Statute of Uses executed the limitation in favour of his heir at law, and, nothing remaining to be done by the trustees, the trust ceased. The necessary implication from the whole of the will, is, that the intention of the testator was that the estate of the trustees in this house should continue only during the life of Jonathan Spence the younger. [WILLIAMS, J.—I find from the report of the case of *Creaton v. Creaton*, in 3 Smale & G. 386, that the will was dated in 1818, and not in 1848, as stated in the report in the 26 Law J., Ch. 267, which accounts for no mention being made of the Statute of Wills.]

WILLIAMS, J.—I am of opinion that the nonsuit in this case was right. At the trial the plaintiff made a *prima facie* case by showing his pedigree. The defendant then put in a will of Jonathan Spence the younger: and the question is, whether that will afforded an answer to the plaintiff's case. I am of opinion that it did. It is not quite clear, nor is it material to consider, what shape the point assumed before my Brother Martin. But it is enough to say that that learned Judge was of opinion that the will so produced amounted to an answer to the plaintiff's \*207] \*case, and that I think so too. I do not know that there is any substantial difference between the case as presented at *Nisi Prius* and as argued before us. The real question is this, whether the

estate given to the tenant for life, with remainder to his right heirs for ever, gave him an estate in fee simple, according to the rule in Shelley's Case, 1 Co. Rep. 88 b, or only an estate for life, with remainder to the issue as purchasers. If Jonathan Spence the younger took a fee, then the defendant claims through that estate, and the will affords an answer to the action: but, if he was tenant for life only, it is no answer. It has been assumed on the part of the plaintiff that he was tenant for life only; and it has been contended, that, as the estate was given to the trustees to pay the rents to the tenant for life, he took an equitable estate only, the legal estate being in the trustees to enable them to perform the trusts, and, that being so, the rule in Shelley's Case did not apply. The answer given on the part of the defendant is, that the two estates are not of different qualities, but that both are equitable estates; that the trustees take the whole legal fee to enable them to perform the trusts; and that the words are words of limitation, and not words of purchase; and consequently that the fee simple goes to the tenant for life. But, as that argument is based on the assumption that both limitations are equitable, and not one legal and the other equitable, the foundation of the argument is that the legal estate is in the trustees, who are not made plaintiffs. It is clear that that is the only practicable shape in which the present case can be put in a court of law. Now, does this will entail such duties upon the executors, who are also trustees, as to make it necessary that they should have the legal estate in the whole fee? No doubt, if there is simply a charge for the payment of debts, and the \*devisees of the estate are not the executors, the mere fact that the estate is charged with the debts will not vest the legal estate in the trustees, unless there be a direction to them to pay the debts. Here, however, the will begins with an express direction to the executors to pay the debts. Then, having directly imposed upon the executors the duty of paying the debts, the testator gives them the whole real estate in fee. The question then arises, what is the nature of the legal estate which executors take where they are directed to pay the debts and are also made devisees of the estate? It is plain upon the authorities, that, where a testator has devised land to trustees for sale, and appointed them executors, and directed them to pay the debts which he has charged upon the land, the fee vests in the trustees. Independently of the statute, the authorities are clear that the whole legal estate is vested in the trustees. It is said that the testator manifestly intended that the devisee for life of this particular property should take all the rents and profits; but it is clear from the earlier words of the will that the testator has charged the whole of his property with the payment of his debts; and, even supposing that it was a mere charge, and that the executors were not directed to pay the debts, the tenant for life would take the estate subject to the charge. But is evident that that is not so: all the subsequent limitations in the will deal with the property subject to the charge. The question is, whether this is more than a charge and amounts to a devise in trust. If it does so, then, according to all the authorities, the trustees take the fee, as being necessary for the performance of their functions. But, independently of the authorities, and the principles established by them, which all lead to the conclusion that the defendant is well

\*209] founded in his contention, we have an \*express authority of *Creaton v. Creaton*, 3 Smale & G. 386, that, where there is a devise to trustees to pay debts, the estate of the trustees cannot be measured by the duration of the life estates. It is impossible to distinguish that case from the present. Indeed *Creaton v. Creaton* is not so strong a case as that now before us; because there it was only by implication it could be taken that the devisees and executors were to pay the debts, whereas here there is an express direction to that effect: all are charged upon the land. In all other respects *Creaton v. Creaton* is exactly in point. Vice-Chancellor Stuart says: "It is impossible to say, the testator having given the fee simple to the trustees, whom he also appoints executors and directs to pay the debts which he has charged upon the land, that the fee simple so given is to determine on the expiration of the estates for life. There is a trust to be performed, on the performance of which the duties of the trustees would cease; but the time for the performance of which cannot be certainly fixed during the continuance of the life estates. If, then, the trust cannot be measured by the duration of the life estates, it is impossible to fix any particular period for its determination. So long as it remains unexecuted, the trustees require the absolute dominion over the estate which is given them by the will, to enable them, if necessary, to transfer the estate to a purchaser. Had there been in this will no charge of debts, on the construction which must be given to the language of the testator, the fee simple given to the trustees would have determined on the expiration of the life estates. But the direction to pay his debts requires for its performance a larger estate in the trustees. The fee simple for an indefinite period being in the trustees, and no certain time being fixed for the determination of the

\*210] fee simple estate, all the estates limited in \*remainder must necessarily be equitable estates." The result was, that, the estates being both equitable, the rule in *Shelley's Case* did apply, and consequently the estate of the tenant for life was enlarged into a fee; the trust being for the right heirs. I cannot, therefore, come to any other conclusion than the Vice Chancellor did in that case. The legal fee being in the trustees, the plaintiff was properly nonsuited.

WILLES, J.—I am of the same opinion. In addition to the case of *Creaton v. Creaton*, I would refer to that of *Smith v. Smith*, 11 C. B. N. S. 121 (E. C. L. R. vol. 103), which was mentioned by my Brother Williams during the argument. That was a very remarkable case. There, the will gave all the testator's real and personal estate to trustees, in trust, *after payment of his just debts* and funeral and testamentary expenses, to convert the personal estate into money, to be placed at interest; and then he gave all "the profits" arising from his real estate, and the interest of his personal estate, to his wife, to be applied to her maintenance and support, at the discretion of the trustees, if she should need the whole of it, during her life; and afterwards to his niece Mary Clarke a legacy of 500*l*. Then he willed that his trustees should put his kinsman George Smith into possession of a close called "The First Close," which he gave to the said George Smith. And this was followed by a devise in these terms,—“Then I give all that my close or piece of land called ‘The Second Close,’ with all the appurtenances, unto my kinsman William Smith, son of my late brother

William Smith." And the Court held looking at the whole of the will, that the trustees took the legal fee; for that, although the testator's direction to them, after giving them all his real and personal estate, to convert, after payment of his debts, the personal estate into money, \*and perform the other specific trusts, might per se constitute [\*211 only a charge of the debts on the real estate, yet that that direction might in the case before them be regarded as sufficient to indicate that the testator meant the trustees to take the legal fee conferred upon them by the word "estate," and to hold it after the performance of the other trusts, in trust for William Smith, to whom it was devised. That case goes quite as far as *Creaton v. Creaton*: and that was with reference to the state of the law which existed before the statute, when it was often contended that the trustees only took such an interest as was sufficient for the performance of the trusts imposed upon them,—a very inconvenient sort of estate. Accordingly, we find that inconvenience removed; for, the statute 7 W. 4 & 1 Vict. c. 26, having by s. 28 enacted that, "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will," goes on in s. 31 to provide for a class of cases of which this is one,— "Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied." I am far from saying that the words "in trust," which are \*found in this will, would alone have the effect of giving the legal estate to the trustees. The case of [\*212 *Blagrove v. Blagrove*, 4 Exch. 550,† is quite conclusive as to that. But I say that those words "in trust" are at all events quite consistent with the legal estate being vested entirely in the trustees. Then, is there anything which by implication shows that they were to take any less estate? Certainly not: but there is something which by implication shows the contrary. There is a direction to the trustees to pay the debts and funeral and testamentary expenses. The consequence is that they take power over all the property, for the purpose of enabling them to pay the debts and funeral and testamentary expenses: and they can only have that power by allowing them to take the legal fee. That, therefore, which was settled by the authorities before the statute is now conclusively settled by the statute. The course taken by Baron Martin at the trial was correct, although his reasons are not in terms with those which we act upon.

BYLES, J.—I am of the same opinion. This rule was granted entirely on the ground that the first trust to be performed during the life of the son was an active trust, and that, after his death, as the will goes on to say that the estate was to go "in trust for the right heirs"

of the son for ever, that was a passive trust, there remaining nothing more for the trustees to do. But our attention was not called to the provision that the testator's debts and funeral and testamentary expenses should be paid by the trustees, who were also executors. Mr. Jarman, in his treatise on Wills, 8d edit. Ch. 34, upon a review of all the authorities, comes to this conclusion, that, although the mere fact that the devised property is charged with debts or legacies \*213] will not vest the legal estate in the trustees, unless \*they are directed to pay them, or the will contains some other indications of an intention to create a trust for the purpose; yet, where the land is devised to the trustees, and they are appointed executors, and are directed to pay the debts, which the testator has charged upon the land, the legal estate vests in the trustees, and the beneficiaries are only cestuis que trust. The case of *Creton v. Creton*, 3 Smale & G. 886, is distinctly in point. There, the testator, after directing payment of his debts in the first place, devised all his copyhold estates to three trustees (also his executors) and the survivor of them, and the heirs of the survivor, upon trust to pay the rents to his daughters and the survivor of them, for life, in equal moieties, and, after the decease of the survivor he devised the estate (in moieties) to the heirs of the body of each of his daughters, with remainder over to the right heirs of his surviving daughter: and it was held that the interests limited in remainder were equitable estates. There, as here, there was first an active trust in favour of the tenant for life, and then a mere passive trust: but the debts were to be paid: and the Vice-Chancellor (Stuart) held, in conformity with the rule laid down in Jarman, that the last estate was a mere equitable estate. There, too, the will was made before the late Statute of Wills: here, it was made after. As soon as it was pointed out to us that this will contained a direction to the trustees (who are also executors) to pay the debts, &c., the ground of the rule failed. The nonsuit was quite right.

WILLIAMS, J.—I omitted to mention the statute 7 W. 4 & 1 Vict. c. 26, because no mention is made of it in the case of *Creton v. Creton*.  
Rule discharged.

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\*214] \*DAVID BROADBENT, Appellant; RICHARD VARLEY and Others, Respondent. *May 5.*

A. deposited with B. certain share certificates in a gas company as security for a loan, and afterwards by deed assigned *all his personal estate* to C. and D., in trust for the benefit of his creditors. The assignees gave notice of the assignment to the company; but B. omitted to give notice of his equitable lien:—Held, that, notwithstanding the omission of such notice, C. and D. could not maintain trover against B. for the share certificate.

1. THIS was an action brought in the County Court of Yorkshire, holden at Huddersfield, by the plaintiffs, as trustees under a general deed of assignment executed by David Carter of Slaithwaite, for the equal benefit of his creditors, to recover from the defendant the sum of 30*l.*, the value of four shares of 5*l.* each in the Slaithwaite Gas Company, which had been the property of David Carter, and were alleged to have passed by the assignment before mentioned to the

plaintiffs, and which it was alleged the defendant had wrongfully converted to his own use.

2. The cause came on for trial at Huddersfield, on Thursday, the 30th of January, 1862, before the Judge of that Court, when a verdict was given for the plaintiffs.

3. The defendant was dissatisfied with the ruling of the said Judge in point of law and fact, and gave notice of appeal, pursuant to the 13 & 14 Vict. c. 62.

4. The following evidence was given at the trial :—A deed of assignment by David Carter, dated 19th of March, 1861, of his personal estate to the plaintiffs as trustees for Carter's creditors, was put in.

5. It was then proved, that, in October, 1857, David Carter deposited the four certificates of shares in the Slaithwaite Gas Company (which is a Company registered under the Acts of Parliament relating to Joint Stock Companies), with the defendant for securing 20*l*. then lent by him to David Carter, who at the same time borrowed of him 10*l*. in addition to the 20*l*., which 10*l*. was to be repaid to the defendant in the week following.

\*6. Contemporaneously with the advance of the money and the delivery to the defendant of the share certificates, there was an [\*215 agreement in writing signed by David Carter and delivered to the defendant in reference to such transaction, and declaring the terms upon which the certificates were deposited with the defendant; but this agreement was not produced on the trial by the defendant or his solicitor, although they had been served with notice to produce it; and objection was taken to the admission of any other evidence in proof of the equitable charge sought to be made out by the defendant.

7. The moiety of the said sum of 10*l*. was repaid at the time fixed for payment of the 10*l*., but the other 5*l*., along with the said sum of 20*l*., making together 25*l*., is still owing by Carter to the defendant.

8. In May, 1858, the defendant asked Carter for the other 5*l*. David Carter said it would be inconvenient to pay it, but paid him half a year's interest on the 25*l*., and said the defendant should hold the certificates for the 25*l*., as he considered they were worth the 25*l*.; and to this the defendant agreed.

9. David Carter's name remained in the Gas Company's books as the proprietor of these shares: and he received all dividends which became payable thereon (and without making any payment either of principal or interest to the defendant) until March, 1861.

10. In that month, David Carter was in difficulties, and, on the 18th, was in the house of Thomas Sykes, the secretary of the Gas Company, when Sykes asked Carter if he had his shares to sell, and Carter replied, No, he had already disposed of them; but did not say to whom he had sold them. This conversation was in the absence of and without the knowledge of the defendant, and was the only notice (if such it can be called) which was ever given to the Gas Company of \*the defendant's alleged equitable mortgage of the shares; and the secretary did not inform the Company of the conversation [\*216 which he then had with Carter until after Carter had executed the deed of assignment next hereinafter referred to, and the assignees under such deed had caused the Gas Company to be served with

notice in writing of such deed and of their claim to be the proprietors of such shares.

11. On the 19th of March, 1861, David Carter executed an assignment of all his personal estate for the equal benefit of his creditors, the plaintiffs being the trustees under that deed. No particulars of David Carter's property were given; nor were the gas shares mentioned in the deed.

12. On the 17th of April, 1861, the plaintiffs, by their solicitor, gave a notice in writing of their assignment to Sykes, as secretary, on behalf of the Gas Company; and, when Sykes, the secretary, communicated the notice to the directors, he at the same time informed them of the conversation which he had had with David Carter on the 18th of March, 1861.

13. It was proved that the four certificates had been demanded on behalf of the plaintiffs from the defendant, who thereupon replied that he would give them up on payment of the money due from David Carter to him.

14. The action was brought to recover the value of the shares.

15. For the plaintiffs, it was contended that the defendant must produce the memorandum of deposit, or fail in his defence.

16. It was further contended there could not be an equitable mortgage of shares in this Company created by a mere deposit of share certificates; but that, if there could, it was necessary that notice should \*217] be given to the directors for completing such equitable mortgage, inasmuch as shares were choses in action, the transfer of which ought to be followed by notice, and it was a question whether a mere deposit of share certificates without notice could be allowed to prevail as against an assignment by deed for the equal benefit of creditors completed by proper notice thereof in writing to the Company.

17. The cases of *Ex parte Littledale*, in *re* *Pearse*, 24 Law J., Bankruptcy, 9, and *Ex parte Boulton*, in *re* *Sketchley*, 26 Law J., Bankruptcy, 45, were cited.

18. For the defence, it was contended that the shares were title-deeds, and that notice to the directors was not necessary; that Carter made the deposit, and was himself bound by it; that the plaintiffs, as assignees of Carter under the deed of assignment, were only entitled to such interest as he had in his personal estate before the execution of that deed; and that, if an equitable mortgage of shares or certificates could not be granted without notice, such notice had been given to the Company in the conversation which took place between Carter and Sykes on the day before the date and execution of the assignment, and therefore this was a good equitable mortgage, with notice.

19. After the case had been fully heard, the Judge asked the defendant's attorney whether he had completed his case, and, on being answered in the affirmative, said, "Then I think there is no case. You have not put in the agreement of deposit, or proved that the defendant ever gave notice to the Company of his alleged equitable mortgage." At this point of the judgment, the defendant's attorney interposed, and said he could not put in the agreement of deposit, because it was not stamped: and the Judge proceeded to state that he

was of opinion that certificates were not title-deeds, and it was very doubtful whether any equitable mortgage could be created by the deposit of \*share certificates; and, if it were possible, it would at least require notice of the transaction to be given to the [218 Company, which had not been given in this case; that the friendly and casual conversation by Carter with Sykes, the secretary of the Gas Company, in Sykes's house, was not in his opinion notice to the Company; that, as Carter was in the books of the Company the only party entitled to the certificates, his trustees were now the parties properly entitled to them; and that he should, therefore, give judgment for 26*l*, the value of the shares.

Against this decision the defendant appealed, the grounds of appeal being,—

"1. That the deposit of the certificates with the defendant as security for money lent by him to David Carter entitled him to hold the certificates as against the plaintiffs, even though no notice of the deposit had been given to the Gas Company, and that the determination of the Court that such deposit without notice thereof to the said Company did not entitle the defendant so to hold the certificates, was erroneous in point of law:

"2. That the defendant, by virtue of the deposit, even without notice thereof to the Gas Company, had a good equitable title to the shares to which the certificates related, and was entitled to have the said shares transferred into his own name in preference to the plaintiffs who claimed under a deed of assignment made subsequently to such deposit, and that the determination of the Court that the plaintiffs were entitled to the shares was erroneous in point of law, and, even if correct, this would not entitle the plaintiffs to the certificates as against the defendant who had a good lien or security thereon by virtue of the deposit thereof by David Carter before the assignment to the plaintiffs:

"3. That the determination of the Court that the certificates [219 were not title-deeds, and that therefore there could not be an equitable deposit of them without notice, was erroneous in point of law.

"4. That the determination of the Court that sufficient notice of the deposit had not been given to the Gas Company, even if such notice was necessary, was erroneous in point of law."

*Kemplay*, for the appellant.—The question of notice cannot arise. The title of the plaintiffs, who were mere assignees at common law, cannot prevail against the prior right of the defendant. [The Court called upon

*Mellish*, Q. C., for the respondents.—The question is whether the legal property in the paper did not pass to the respondents by the assignment of the 19th of March, 1861. The appellant ought to have produced the agreement under which he claimed to hold the shares.

*ERLE*, C. J.—The appellant is entitled to judgment. He clearly was not guilty of a wrongful conversion of the shares, seeing that they were deposited with him as security for a debt. Whether the deposit amounted to a transfer of the property or not, it is quite clear that Carter, the debtor, could not have maintained trover against the appellant to recover them back: and, if not, neither could the now

respondents. The appellant is entitled to judgment, and to the costs of the appeal.

The rest of the Court concurring,

Judgment for the appellant, with costs.

**\*220] \*THE QUEEN v. THE OFFICIAL PRINCIPAL OF THE  
CONSISTORY COURT OF LONDON.**

**Ex parte BEALL.**

In a district constituted under provisions of the Church Building Act, 58 G. 3, c. 45, and assigned to a church built under that Act, it is competent to the church-wardens and inhabitants to make a rate not merely for the repair of the edifice, but also for the expenses necessary for the performance of Divine service therein.

COLLIER, Q. C. (with whom was *Taylor*), moved for a rule calling upon the official principal of the Consistory Court of London to show cause why a writ of prohibition should not issue, to prohibit him from further proceeding in a suit in the said Court instituted by M. W. Adams and B. Parsey, churchwardens of the district church of St. Bartholomew, Sydenham, in the county of Kent, against Richard Beall, for subtraction of church-rates.

It appeared from the affidavit upon which the motion was founded, that Richard Beall was an inhabitant ratepayer of that part of the parish of Lewisham which forms the district parish of St. Bartholomew, Sydenham; that a vestry of the inhabitants of the parish of Lewisham residing in the said district parish was held on the 14th of June, 1860, at which the churchwardens produced an estimate of the expenditure of the said churchwardens from Easter, 1860, to Easter, 1861; and that a rate was then made, the heading of which was as follows:—

“District parish of St. Bartholomew, Sydenham, Kent.

“We, the churchwardens and other parishioners of the district parish of St. Bartholomew, Sydenham, in the county of Kent and diocese of London, whose names are hereunto subscribed, do, at this our vestry meeting for that purpose assembled, rate and tax all and every the inhabitants and parishioners of the district parish aforesaid hereafter named, at the sum of 2*d.* in the pound upon the several assessments hereinafter set forth, for and towards the repairs of the  
\*221] said district \*parish church of St. Bartholomew, Sydenham, in the said county of Kent, for the present year. As witness our hands,” &c. [Signed by the perpetual curate, the churchwardens, and some other parishioners.]

Then followed the usual form of rate and assessment, and then the following note:—

“At a vestry meeting this day held and convened by due notice, we whose names are hereunto subscribed, inhabitants of the district parish of St. Bartholomew, Sydenham, in the county of Kent, do agree to the before-written church-rate or assessment. As witness our hands, this 15th day of June, 1860.” [Signed as before.]

In this rate, the said Richard Beall was assessed in the sum of 1*l.*

2s. 6d.; and, as he refused to pay, a summons was taken out against him before certain justices of the peace. He appeared on the summons, but disputed the validity of the rate, and thereupon a suit was commenced against him in the Consistory Court. The first two articles of the libel were as follows:—

“1st. That in the year 1855, a portion of the parish of Lewisham, in the county of Kent and diocese of London, was, by an order of Her Majesty in council, bearing date the 8th day of February, 1855, made in pursuance of an Act of Parliament passed in the 58th year of the reign of His Majesty King George the Third, intituled ‘An Act for building and promoting the building of additional churches in populous parishes,’ and in pursuance of all other powers in such behalf contained in the Church Building Acts, formed into a district parish for ecclesiastical purposes, and the bounds and limits of such district parish were described and defined as by law directed, by the title or description of the district parish of St. Bartholomew, Sydenham; and such district parish was assigned to the consecrated church of [\*222 St. Bartholomew, situate at Sydenham, in the said parish of Lewisham; that such district church thereby became by law a district church for all ecclesiastical purposes, and the persons inhabiting such district parish, under the law in that behalf made and provided, and under the authority of the said statute of the 58 G. 3, c. 45, and other statutes, liable to contribute to the repairs of the said district church of St. Bartholomew, Sydenham, and to contribute to any rate or rates made for the repairs of the same, and for the payment of the expenses necessary and legally incident to the decent celebration of Divine service therein, and to the office of churchwardens in the said district parish; and in part supply of proof of the premises party proponent craves leave to refer to the aforesaid order of Her Majesty in council, of the 8th day of February, 1855, printed in the London Gazette of the 13th of February, 1855, a copy of which will be produced, if necessary, at the hearing of this cause: and this was and is true, public, and notorious; and the party proponent alleges and propounds everything in this and the subsequent articles of this libel contained, jointly and severally:

“2d. That the said churchwardens of the district parish of St. Bartholomew, Sydenham, aforesaid, had not sufficient funds in hand to effect the necessary repairs of the said district parish church, or to provide necessaries for the decent celebration of Divine service and offices therein, and for the other expenses necessary and legally incident to their office, for the then current year, wherefore they, the churchwardens aforesaid, and other the parishioners and inhabitants ‘(ratepayers)’ of the said district parish, on the 14th day of June, in the year 1860, met together in vestry in the National School-room at Sydenham aforesaid, pursuant to notice thereof previously and duly given according \*to law, to make a rate, in order to raise funds [\*223 for the purposes aforesaid, and which notice was in the words following, to wit,—“District parish of St. Bartholomew, Sydenham: Notice is hereby given, that a vestry meeting will be holden in the National School-room, Sydenham, on Thursday, the 14th day of June instant, at 5 o’clock in the afternoon precisely, to make a church-rate: and notice is hereby further given, that, if a poll shall be demanded

on all or any or either of the propositions, resolutions, or amendments, which may be submitted to the vestry, the vestry will be adjourned to the following day, Friday, the 15th day of June instant, at 8 o'clock in the forenoon, when the polling will commence at the place aforesaid, and continue till 6 in the evening of the same day, and the poll will then close, and the chairman will declare the result thereof. Charles English, M.A., perpetual curate; Mayow W. Adams, Benjamin Pearsey, churchwardens. June 9, 1860. And this was and is true, public, and notorious, and the party proponent alleges and pro-pounds as before.

The libel then went on to state the proceedings at the poll, the carrying of the resolution for the rate, the making of the same as before set out, and the proceedings against Richard Beall.

The estimate above mentioned was as follows:—

“Estimate of the expenditure of the churchwardens of the district parish of St. Bartholomew, Sydenham, from Easter, 1860, to Easter, 1861:—

	£	s.	d.
“Organist . . . . .	52	10	0
“Cleaning of church, and attendant . . . . .	35	0	0
“Beadle . . . . .	25	0	0
“Organ-blower . . . . .	5	0	0
“Organ-tuner . . . . .	5	0	0
“Clock-winder . . . . .	5	0	0
“Coals and firing . . . . .	15	0	0
“Candles . . . . .	15	0	0
“Transcribing registers . . . . .	3	0	0
“Insurance of church . . . . .	13	11	3
“Repairs . . . . .	45	0	0
“Water and gas-rates, printing, stationery, and contingencies . . . . .	23	0	0
		242	1 3

“A rate of 2d. in the pound on 35,812l., the gross rental of the parish, will return . . . . .		298	8 8
“Deduct for empty houses, defaulters, &c., 15l. per cent. . . . .	45	0	0
“Cost of collection, at 5l. per cent. . . . .	12	13	6
		57	13 6

“Estimated net produce of rate . . . . . £240 15 2

“M. W. ADAMS, } Churchwardens.”  
“B. PEARSEY, }

It was contended in the Consistory Court that the rate was made for purposes other than the repairs of the church, and that therefore it was bad. The Judge, however, held that it was good.

The question is, whether, in a district parish created under the first Church Building Act, 58 G. 3, c. 45, a rate being directed to be raised “for repairs of the church,” is to be limited to repairs only, or may be applied to all the expenses incident to the Divine service and the office of churchwarden. The proposed rate was “for and towards the repairs of the district parish church of St. Bartholomew, Sydenham;” and out of 287l. 1s. 3d., 45l. only is applicable to the repairs of the church. Now, the rate is the creature of the statute, and can only be applicable to the purposes mentioned in the statute. The title sufficiently expresses the object of the Act,—“for building and promoting the building of additional churches in populous parishes.” The 15th

section enacts "that the Commissioners, in the selections of parishes and extraparochial places, for making their distribution of the sums granted by this Act, shall have regard to the amount \*of population in such parishes and extraparochial places, and also the [\*225 disproportion between the number of inhabitants and the present accommodation for attendance upon Divine service; and, in giving preference among such parishes and extraparochial places, shall have regard to the proportion of the expense of affording the accommodation required which shall be offered to be contributed or raised in aid of the purposes of this Act towards the building churches or chapels in such respective parishes or extraparochial places, and to the pecuniary ability of the inhabitants of such parishes or places; and the said Commissioners, in giving preference as between parishes and extraparochial places not offering to contribute any proportion of such expense as aforesaid, shall have regard to the order of priority in which parishes and extraparochial places under similar circumstances as to population, and disproportion between such population and the accommodation afforded by the churches and chapels therein, shall have provided and given notice to the Commissioners of having provided sites for the churches intended to be built in such respective parishes or extraparochial places." That refers to parishes and extraparochial places then existing. The 16th section enacts, that, "in every case in which the said Commissioners shall be of opinion that it will be expedient to divide any parish into *two or more distinct and separate parishes* for all ecclesiastical purposes whatever, it shall be lawful for the said Commissioners, with the consent of the bishop of the diocese in which such parish is locally situated, signified under his hand and seal, to apply to the patron or patrons of the church of such parish, for his consent to make such division, and for such patron or patrons to signify his or their consent thereto under his hand and seal; and the said Commissioners shall, upon the consent of the said patron or patrons so \*signified, represent the whole matter to His Majesty in council, and shall state in such representation the bounds by [\*226 which it is proposed, with such consent as aforesaid, to divide such parish, together with the relative and respective proportions of glebe land, tithes, moduses, or other endowments, which will by such division arise and accrue and remain and be within each of such respective divisions; and also the relative proportions of the estimated amount of the value or produce of fees, oblations, offerings, or other ecclesiastical dues or profits which may arise and accrue within each of such respective divisions; and if thereupon His Majesty in council shall think fit to direct such division to be made, such order of His Majesty in council shall be valid and good in law for the purpose of effecting such division." Under that section, a "separate and distinct parish" is different from a "district parish:" per Dr. Lushington, in *Varty v. Nunn*, 2 Curt. Eccl. Cas. 877, 893. The 21st section enacts, that "in any case in which the said Commissioners shall be of opinion that it is not expedient to divide any populous parish or extraparochial place into such complete separate and distinct parishes as aforesaid, but that it is expedient to divide the same into such ecclesiastical districts as they with the consent of the bishop, signified under his hand and seal may deem necessary for the purpose of affording accommo-

dation for the attending Divine service to persons residing therein in the churches and parochial chapels already built, or in additional churches or chapels to be built therein, and as may appear to such Commissioners to be convenient for the enabling the spiritual person or persons who may serve such churches or chapels to perform all ecclesiastical duties within the districts attached to such respective churches and chapels, and for the due ecclesiastical superintendence of such district, and the

\*227] \*preservation and improvement of the religious and moral habits of the persons residing therein, the said Commissioners shall represent such opinion to His Majesty in council, and shall state in such representation the bounds by which such districts are proposed to be described; and if thereupon His Majesty in council shall think fit to direct such division to be made, such order of His Majesty in council shall be valid and good in law for the purpose of effecting such division; or, in any case in which the said Commissioners shall be of opinion that it is not expedient to make any such division into such ecclesiastical districts as aforesaid, the said Commissioners may build or aid the building of any additional chapels in any such parishes or extraparochial places, to be served by curates to be respectively nominated and appointed by the respective incumbents of the churches of the respective parishes or extraparochial places, and licensed by the bishop of the diocese; such curates to be paid such salaries as shall be assigned by the said Commissioners under the provisions of this Act in manner hereinafter directed." The 24th section enacts "that such boundaries shall continue to be the boundaries of such parishes or districts respectively, unless so altered, and such districts shall thereupon become and be called district parishes, by such names as shall be given to them respectively in the instrument so enrolled as aforesaid, and shall become and be separate and distinct district parishes, and the churches and chapels respectively assigned to such districts shall, when duly consecrated for that purpose, become and be the district parish churches of such district parishes, for all purposes of ecclesiastical worship and performance of ecclesiastical duties, and as to all marriages, christenings, churchings, and burials, and the registry thereof within the same, and in

\*228] relation to all fees, \*oblations, and offerings, and the demanding, suing, and prosecuting for and recovering the same, and as to all other purposes whatsoever, save and except as is in this Act particularly excepted." The 31st section enacts that "no divisions of any parish or extraparochial place, whether it be divided into separate parishes with the consent of the patron and bishop of the diocese, or into district parishes, nor anything in this Act contained in relation thereto, shall affect or in any manner be construed to affect any parish or extraparochial place so divided, or the persons residing therein, in any other respect than in this Act particularly provided, or in any manner to apply to any poor or other parochial rates which may be raised in the parish or extraparochial place so divided, or in any such separated parish or district parish, or to the maintenance or relief of poor persons, or to any title or claim to such relief, or to any powers relating to any such rates, or holding vestries, or appointment, or powers of parish officers, or any such relief or claim thereto, or to any Act or Acts of Parliament or law or custom relating thereto, save

and except as to church-rates in so far as the same are regulated by the provisions of this Act; but the original parish shall to all such purposes remain and continue in law a parish to all intents as if no such division thereof into separate parishes or district parishes had been made." The 35th and subsequent sections provide for the appropriation of sites for additional churches. The 56th section enacts "that the church-rates of the parish shall in all cases be and be deemed in law to be the security for the repayment of all money expended by the parish in providing any site or sites, or advanced by the Commissioners to any parish under the provisions of this Act, or paid by the Commissioners in cases of neglect in providing sites; and all such sums of \*money so expended or advanced under the [\*229 provisions of this Act in carrying into execution the purposes thereof in any parish, shall be and are hereby made chargeable and charged upon such rates; and the churchwardens shall in every such case make, and they are hereby required and empowered to make, proper and sufficient rates for repaying such expenses and advances within the periods or at the times which shall be specified by the Commissioners under the authority of this Act in that behalf." The 57th section enacts, that, "in every case in which any sum or sums of money shall have been expended in purchasing any site or sites for any church or churches, or chapel or chapels, or advanced by the Commissioners under the provisions of this Act, for any extraparo-chial place in which no church-rates shall be made, raised, or collected, it shall be lawful for the said Commissioners to require any justice or justices acting in or for the division of the county in which such extraparo-chial place shall be, and every such justice or justices shall from time to time as the case may require appoint two or more proper persons to make, raise, collect, and levy rates for making all such payments and repayments as may be required under the provisions of this Act; and all such persons so appointed shall have all such and the like powers and authorities for making, raising, levying, and collecting and enforcing payment of any such rates as any churchwardens have by law in that behalf, and are hereby required and empowered to make, raise, levy, and collect sufficient rates for making such payments and repayments as aforesaid; and all sums so expended or advanced shall be charged upon such rates and paid thereout at such times and in like manner and under the like provisions as if such place had been and was a parish in which church-rates were made, levied, and collected by law; and all \*such rates shall be [\*230 deemed in law church-rates for the purposes of this Act, and made, raised, levied, collected, and accounted for as such; and all Acts of Parliament, and clauses, provisions, regulations, penalties, and forfeitures contained in any Act or Acts of Parliament, and all powers, authorities, and laws, ecclesiastical or others, for the making, raising, levying, collecting, and accounting for church-rates, shall apply and be enforced for the making, raising, levying, and collecting such rates in any such extraparo-chial place from time to time when and so often as it shall be or become necessary to make or raise any such rates for the purposes of this Act." The section upon which the question mainly turns is the 70th, which enacts that "*the repairs of all such district churches or chapels shall be made by the districts to*

which they respectively belong, by rates *within the district*, in like manner as in case of *repairs of churches by parishes*; and every such district shall be deemed in law a separate and distinct parish for that purpose: and the repairs of all chapels not made district churches shall be made by the parish in for which the chapels shall be built." And the 71st section provides that the *district* shall remain liable for repairs of the *parish* church for twenty years. There being these express provisions for raising rates for the *repair* of the church, it is not competent to the overseers or the vestry to make a rate for purposes other than repairs. Originally, the reparation of the church was a charge upon the tithes: see Lyndwood's Provinciale, Lib. 1, Tit. 10, p. 53; 1 Bl. Comm. 413, 414; Burn's Ecclesiastical Law, *Church* VI. In process of time, however, the burthen of maintaining the fabric of the church was cast upon the laity; as was afterwards that of providing the church ornaments: 2 Rol. Abr. *Prohibition* (K.). In *Gathercole v. Wade*, 1 Burn's Eccl. Law, by Phillimore 388 *a*, Dr. Lushington \*231] observes, that the validity of the rate would be impugned if the objects for which it is raised, and on which it is expended, were illegal and foreign to the nature of a church-rate. "I apprehend," says that learned Judge, "that there is a class of expenses which may be called necessary expenses, and which it is within the power of the churchwardens to defray out of the rate without the authority of the vestry at all; such as the necessary repairs of the church (not adding to the church anything new), the sacramental bread and wine, and other articles required for the decent performance of Divine service. But there is another class of expenses which it would not be within the power of the churchwardens alone to defray, and which require the approbation and assent of the vestry: these are such expenses as are incurred by erections connected directly or indirectly with the performance of Divine service, or which relate to the church; this class of expenses would be legal when approved of by the vestry. There is still another class of expenses which have sometimes been defrayed out of a church-rate, which have nothing to do with it, or at least are not within the limits beyond which a church-rate can properly be extended, and which it is not within the power of the churchwardens, the vestry, and the parish together to defray out of the rate." [BYLES, J.—That is somewhat qualified by *Gosling v. Veley* (the Braintree Case), in the House of Lords,—4 House of Lords Cases 679.] And in *Tann v. Owen*, 1 Burn 388 *b*, it was held that "a large illegal item, such as, '*provision for the incumbent*,' entirely vitiated the rate: and the salary of the organist, the organ, the wages of pew-openers, were said to require the consent of the majority of the vestry." Here, the rate was agreed to, not at a vestry properly speaking, but at "a meeting of the inhabitants." In the statute 4 & 5 \*232] W. & M. c. 12, a distinction is made \*between repairs and church ornaments. The stipend of the minister and the expenses of the celebration of Divine service are by the 59 G. 3, c. 134, ss. 26, 27, cast upon the pew-rents. [BYLES, J.—In the year 1818, a church-rate had been made for repairs, and applied also to the expense of Divine service: and this was sustained by the Ecclesiastical Court. It was with reference to that state of things that that statute passed. ERLE, C. J.—A church-rate is not necessarily void because it is in-

tended to apply a portion of the money to be raised to an illegal purpose.] Where there are several illegal items, the rate is altogether invalidated: *Farlar v. Chesterton*, 2 Moore's P. C. 330. [WILLES, J.—That case was much relied on in the Court of error in *Waddington v. The Guardians of the London Union*, 1 Ellis B. & E. 370, 391 (E. C. L. R. vol. 72).] *Chesterton v. Farlar*, 1 Curt. Eccl. Cas. 346, 2 Curt. Eccl. Cas. 77, was also referred to.

ERLE, C. J.—I am of opinion that there should be no rule in this case. The motion is for a prohibition to the Ecclesiastical Court, prohibiting that Court from further proceeding in a suit for subtraction of church-rates. The church-rate in question must for the purpose of this argument be taken to have been made partly for the maintenance of the fabric of the church and partly for the expenses incidental to the performance of Divine service and the duties of the churchwardens,—ordinary lawful expenses for an ordinary church-rate. I take it also that the making of a church-rate is perfectly legal if a part of the things in respect of which it is made be not unlawful. Now, the rate was made in the manner in which church-rates for a district parish are intended by the statute to be made: it was made by the majority of the vestry, and therefore with the consent of the district parish. But the objection \*which has been urged before [\*233 us, is, that the statute authorizing the creation of district [\*233 parishes creates during the first twenty years of the existence of such district parishes a power to make church-rates for one purpose, and for one purpose only, viz. for the maintenance of the fabric of the church; and that, if the church-rate is made for the purpose of meeting any expenses beyond the expenses incident to the maintenance of the fabric, it is unauthorized by the statute. I say that that must be the argument, because the words of the 70th section of the statute are, "that the repairs of all such district churches and chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district, in like manner as in case of repairs of churches by parishes; and every such district shall be deemed in law a separate and distinct parish for that purpose." The statute authorizes the making of a rate for the repair of the church; and, at the first reading, that would give a strong apparent ground for the argument that the rate must be confined to repairs in the ordinary sense of the word, that is, to such expenses as are necessarily incidental to the maintenance of the fabric of the church, and to nothing more. If the word "repairs" is capable of a wider construction,—if, looking at the statute, and at the usage which prevailed at the time when the statute passed, and the known meaning and understanding of "a rate for the repairs of the church," it means something more than money necessary for the maintenance of the fabric, viz. money necessary for the decent celebration of Divine service in the church and the performance of the duties of the churchwardens,—then the items for which the church-rate now in question was made fall within that wider description, and no ground of objection can be urged against any particular item: \*they are all confessedly incidental to the office, and [\*234 necessary for the performance of Divine worship and the duties of the churchwardens. The sole question, therefore, is, whether the word "repairs" is to be taken in the narrow and restricted sense of

expenditure for the payment of the carpenter and the mason for the upholding of the fabric, or whether it is susceptible of the wider sense which I have adverted to. I am very clear, from a consideration of the language of the statute and the usage which has always prevailed on the subject, that a rate for the repair of the church means a rate applicable to all the purposes to which church-rates had been usually applied, viz. the sustaining the fabric, the celebration of Divine service in the church, and the performance of the ordinary duties of the churchwardens. The form of a rate for those general purposes has commonly been "A rate for the repair of the church:" but it has always been applied to the performance of Divine service and the duties incident to the office of churchwarden. The earlier part of the 70th section would *prima facie* require the narrower construction for which Mr. Collier has contended,—“the repairs of all such district churches and chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district.” But the section goes on,—“in like manner as in case of repairs of churches by parishes; and every such district shall be deemed in law a separate and distinct parish for that purpose: and the repairs of all chapels not made district churches shall be made by the parish in or for which the chapels shall be built.” Even without the aid of these latter words, I should have come unhesitatingly to the conclusion that the celebration of Divine worship would be included in the words “repairs of the church or chapel.” The purpose of the legislature was the erection of proper places for the

\*235] celebration of the services and ceremonials of the church, and not to leave it to the uncertainty of voluntary contributions. The section immediately following, viz., the 71st, which is correlative, is to my mind even more distinct to show that the word “repairs” in s. 70 is used in the wider sense of expenses incurred in the maintenance of the fabric, the celebration of Divine service, and the performance of the duties of the churchwardens. It provides “that every such district shall remain nevertheless subject for twenty years, to be accounted from the day upon which the district church or chapel shall be consecrated, to the repair of the original parish church, and be deemed part of the original parish for all purposes of such repairs and the making and levying of rates for that purpose; and, from and after the expiration of such twenty years, the parish church shall be repaired by the district of the parish left as belonging to it after the other divisions of districts are made; and each district shall for ever thereafter make, raise, levy, collect, and apply separate and distinct rates for repairs of the church or churches or chapels of the district, as if a separate parish.” In an earlier part of the statute (s. 16), the district parish is declared to be separated from the original parish; but all the rights of the original parish over the part so separated are retained, and the district parish remains liable to all the burthens to which it was subject while it was part of the original parish, in respect of church-rates, for a period of twenty years. Now, the church-rates made for the repair of the parish church during that period would be church-rates for the repairs of the church in the wide and general sense of including the maintenance of the fabric, the celebration of Divine service, and the performance of the duties of churchwardens;

and s. 71 says that the district shall remain \*subject to the repair of the original parish church for twenty years, and be [\*236 deemed part of the original parish for all purposes of such repairs and the making and levying of rates for that purpose. That must necessarily mean that the district shall remain liable to the original church-rate made in the form in which church-rates had usually been made; otherwise it would be necessary to make two rates,—one for repairs in the strict sense for which the district would be liable, and another for the ordinary purposes of a church-rate applicable as well to the maintenance of the fabric as to the celebration of Divine service and the other purposes to which a church-rate may legitimately be applied. The statute clearly could not have contemplated anything so inconvenient and absurd as the making of two church-rates. Then the latter part of s. 71 makes provision for a separate church-rate for the district after the expiration of the twenty years: it enacts that “each district shall for ever thereafter make, raise, levy, collect, and apply separate and distinct rates for repairs of the church or churches or chapels of the district, as if a separate parish.” If during the twenty years a church-rate involving charges for the celebration of Divine service could not be imposed upon the district, what becomes of the provision for what shall be done after the expiration of the twenty years? The obvious meaning of the 71st section is, that, after the twenty years, the church-rate for the district parish shall be collected as a separate rate, but for the purposes for which the church-rate for the original entire parish was collected, viz., the maintenance of the fabric of the church, the celebration of Divine service therein, and the performance of the ordinary duties incident to the office of churchwarden. The words “repairs of the church” are evidently used throughout these two sections in the same sense. I \*have, as in [\*237 duty bound, come to this conclusion with an original mind, altogether unbiased by the decision which we are informed has been come to by a Court of co-ordinate jurisdiction before whom this application has already been made, but without success.(a) I have looked carefully at the various provisions of the statute, and I pronounce this decision without the smallest hesitation or misgiving. Having come to that conclusion, I am confirmed in it by the view taken by the Court of Queen’s Bench, in the judgment delivered by a learned Judge who has been for a very long series of years especially conversant with the subject of church-rates. I therefore think we should be wanting in what is due to the administration of justice if we cast a doubt upon the question by granting a rule to show cause. For these reasons, I am of opinion that Mr. *Collier’s* motion fails.

WILLES, J.—I am of the same opinion. At the time of the passing of the statute 58 G. 3, c. 45, the law was that the repairs of the church were to be paid for by means of a church-rate,—a rate for the repair of the fabric of the church, and for the expenses incident to the celebration of Divine service therein, and to the duties to be performed by the churchwardens. Taking the 70th and 71st sections together, it seems to me to be clear, that, when the 70th section speaks of the

(a) The application had already been made in the Queen’s Bench, and a rule nisi granted, which, after argument and time taken for deliberation, was discharged. See *The Queen v. The Official Principal of the Consistory Court*, 31 Law J., Q. B. 106.

repairs of district churches and chapels being made by the districts to which they respectively belong, "by rates to be raised within the district, in like manner as in case of repairs of churches by parishes," \*238] it means \*nothing more or less than that which is found at the end of the 71st section, viz., that the rate for the district shall be for the repair of the church in the same way as rates for the original parish were made; or, in other words, that church-rates should be made and levied for the district just in the same way and applicable to the same purposes in the district as church-rates were then raised by law for the parish. The language of the 70th section is certainly such as to invite doubt and discussion. But, when the two sections 70 and 71 are looked at together, and with reference to the state of things existing at the time of the passing of the Act, as also at the sections which precede and follow those two, I can entertain no doubt that the construction put upon the Act by Dr. Lushington and by the Court of Queen's Bench is correct.

BYLES, J.—I am of the same opinion, although I must confess that at the opening of the discussion I was a little inclined to think that the construction put by the Judge of the Consistory Court upon the Act of Parliament did some violence to the language. But, upon further consideration, apart from the respect which I must always entertain for a deliberate judgment of the Court of Queen's Bench, if this were *res integra* I should agree with my Lord that the rate in question is such a rate as the statute intended to provide for. The 73d section, it is to be observed, enacts that "two fit and proper persons shall be appointed to act as churchwardens for every church or chapel built or appropriated under the provisions of this Act, at the usual period of appointing parish officers in every year, and shall be chosen, one by the incumbent of the church or chapel for the time being, and the other by the inhabitant householders entitled to vote \*239] in the election of churchwardens, residing in \*the district to which the church or chapel shall belong, and of any extraparochial place by such inhabitant householders as would be entitled to vote in the election of churchwardens if such extraparochial place had been a parish; and the two persons, when so elected churchwardens, shall appear and be admitted and sworn according to law, and shall collect and receive the rents of the seats and pews and pay the stipends or salaries appointed by the Commissioners to be paid to the minister and clerk of and belonging to the church or chapel for the time being, and also shall do, perform, and execute all lawful acts, matters, and things necessary and requisite for and concerning the repairs, management, and good order, and decency of behaviour to be kept and observed in the church or chapel by the congregation thereof." Taking that enactment with reference to the well-understood duties of churchwardens under the common ecclesiastical law, amongst which is that of providing for the decent and proper celebration of the most solemn offices of religion, and the absence of any direct provision for the necessary expenses incident to the performance of that sacred duty, it seems to me to follow that these must have been intended to be provided for by the sections of the statute which have been so often referred to, viz., "by rates to be raised within the district, in like manner as in case of repairs of churches by parishes."

Now, rates raised for the repairs of churches in parishes, are, rates raised for the repair of the edifice, and for other incidental purposes. It is plain from the decision of Dr. Lushington in *Chesterton v. Farlar*, 1 Curt. Eccl. Cas. 345, 355, that the rate which is spoken of in the same words both in the 70th and 71st section is to include incidental expenses. "The inhabitants of every part of the parish," says that learned Judge, "howsoever divided, are bound to contribute to \*the maintenance of the parish church, and all legal expenses [\*240 incident thereto: but there are exceptions admitted by law; and, in the present case, whether such exception exists or not depends on the Church Building Act. The 71st section of the 58 G. 3, c. 45, expressly enacts that 'the district shall remain subject for twenty years, to be accounted from the day upon which the district church or chapel shall be consecrated, to the repair of the original parish church, and be deemed part of the original parish for all purposes of such repairs and the making and levying of rates for that purpose.' I think that, according to the true construction of this clause, the inhabitants of the district are liable to be assessed to the incidental expenses, precisely in the same manner as to the repairs of the mother church: indeed, were it otherwise, the necessary consequence would be great inconvenience and confusion." Upon full consideration, therefore, it seems to me that it is not going too far to say that the 70th section gives not merely an implied but an express power to the churchwardens of the district church to make a rate which, in conformity with the decision of Dr. Lushington in the case cited, shall be applicable to the ordinary purposes to which a church-rate for the parish was by law applicable. The result of the enactment seems to be this,—The district church shall be repaired by means of a church-rate, which church-rate shall be applied, like any other church-rate, to the support of the fabric, the celebration of Divine service, and the other incidental expenses usually and properly chargeable upon it. And this is not only, as it seems to me, a healing decision, tending to settle differences, and consistent with the language of the statute, but it imposes no hardship upon any person. I agree, therefore, with my Lord, that, even if this were *res integra*, there is no room for doubt as to the decision to which we ought to come.

\*KEATING, J.—I entirely concur in the decision at which my Lord and two learned Brothers have arrived. I think it is im- [\*241 possible to give a construction to the word "repairs" in the earlier part of the 70th section of the statute different from that which it must necessarily bear in the subsequent part of that section and also in s. 71. In order to discover the meaning of the legislature those two sections must be taken together, because both are necessary in order to accomplish the operation aimed at by the legislature in the case of separate ecclesiastical districts. The district was to be carved out of the parish, provision was to be made as well for the present repair and service of the church in the district as for that of the mother church, as well as for what was to take place when the district church was to become emancipated at the end of the twenty years. It therefore seems to me to be necessary, in order to ascertain what was the intention of the legislature, to look at the provisions in both those sections. Now, it was not denied by Mr. *Collier*, nor could it

be, that the word "repairs" in s. 71 would include not only the maintenance of the fabric of the sacred edifice, but also the necessary expenses incident to the celebration of Divine service therein: and, as the word must necessarily bear that meaning during the twenty years, I think it would be unreasonable to attach a different meaning to the same word in a cognate section of the Act. The only rational conclusion we can come to is, that the legislature used the same word in the same sense in the two sections, and therefore our decision must be in conformity with those already pronounced by Dr. Lushington and by the Court of Queen's Bench. Rule refused.

**\*242] \*CASWELL, Appellant; COOK, Respondent. May 12.**

The Court will not give the respondent costs on dismissing an appeal against a decision of justices, where the question is a fairly arguable one.

Nor will they listen to an application for that purpose in the term after the decision.

In Hilary Term last, the Court, after a lengthened argument, dismissed an appeal against a decision of justices declining to convict the respondent for an alleged offence against The Markets and Fairs Act, 1847 (10 & 11 Vict. c. 14), and the Wolverhampton Improvement Act, 1853 (16 & 17 Vict. c. xxviii.), in hawking without a license fruit and fish about the streets of that town on a market-day, nothing being said about costs.

*Rider* now moved that the respondent might be allowed his costs of appeal.

*Welsby*, for the respondent, was instructed to show cause in the first instance.

ERLE, C. J.—I was under the impression that costs were asked for at the time, and refused. From my recollection of the matter, I should certainly say that it was not a case for costs.

BYLES, J.—It is a most inconvenient thing to come and ask for costs in the term after the case was disposed of, and when the application is necessarily made to a Court somewhat differently constituted from that which pronounced the judgment.

KEATING, J.—The case was one of great public importance, involving a question of much interest to the whole town; and by no means a case in which costs would have been given. *Rider* took nothing.

**\*243] \*LOCKSTONE v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. May 13.**

In an action against a railway Company for an injury resulting from the negligence of the company's servants, the Court directed that the costs of copying into the plaintiff's briefs the evidence given at an inquest held upon the bodies of other persons who had been killed on the same occasion should be disallowed.

The number of counsel to be allowed, and the amount of their fees, is in the (almost uncontrolled) discretion of the master.

THIS was an action brought against the London, Brighton, and South Coast Railway Company, to recover damages for an injury sustained by the plaintiff, a passenger by the defendants' railway, on the occasion of the collision which took place between two of their trains in the Clayton Tunnel, near Brighton, in August last.

The cause went down to trial at the last Spring Assizes at Lewes, when the parties agreed to a compromise, the defendants consenting to pay 50*l.* in addition to 500*l.* which had been paid into Court.

The defendants had originally pleaded not guilty: but, on the 14th of February (the commission-day at Lewes being the 24th), they obtained leave to withdraw that plea and pay money into Court.

On the taxation of the plaintiff's costs, the master allowed the copying into the briefs of the whole of the evidence which had been given at the inquest held upon the bodies of a great number of persons who were killed on the occasion of the accident out of which this action arose. He also allowed three counsel, and their fees to the amount of 30, 25, and 20 guineas respectively.

*Bovill*, Q. C., on a former day in this term, moved for a rule calling upon the plaintiff to show cause why the master should not be at liberty to review the taxation. He submitted that the evidence at the inquest was perfectly irrelevant, and ought not to have been set out in the brief; and that the number of counsel and \*the [\*244 amount of the fees allowed was necessarily influenced by the [\*244 improperly increased bulk of the briefs.(a)

*ERLE*, C. J.—The rule may go as to the evidence given at the inquest and also as to the number of counsel allowed. As to the amount of fees, we are unwilling to interfere with the master's discretion: but, if the master would not have allowed such an amount for fees if the irrelevant matter had not been set out in the briefs, he may be at liberty to reconsider that also.

*Lush*, Q. C., now showed cause, upon an affidavit which stated, amongst other things, that one copy of the proceedings and evidence on the inquest had been made for the purpose of instructions to counsel to advise on evidence, and that the other two copies were made six weeks before the commission-day. He submitted that the proceedings at the inquest were by no means irrelevant, it being highly important that counsel should be accurately informed of all the circumstances under which the accident occurred, and that even after the defendants had by paying money into Court admitted that they had been guilty of negligence; that the master, upon the objection being taken before him, read the briefs and the proofs, and in the exercise of his discretion allowed the charge; that the Court is not in the habit of interfering with the master's discretion where no principle is involved; and that the number of counsel to be allowed, and the amount of their fees, was purely for the master.

\**Bovill*, in support of his rule.—The evidence given before the coroner could not possibly have any legitimate influence [\*245 on the matter in issue between these parties: and in no event could three copies of those voluminous proceedings be necessary. [*ERLE*, C. J.—The copy made for instructions for counsel to advise on evi-

(a) The application had already been made to *Williams*, J., at Chambers; but he declined to interfere.

dence may perhaps be considered necessary; but the other two should, I think, have been disallowed.] Then, as to the number of counsel and their fees. [ERLE, C. J.—The master intimates to us, that, looking at the number of witnesses (fifteen) that the plaintiff had to call, and to the fact that there were three counsel engaged on the part of the Company, he did not consider three counsel too many or the fees exorbitant: and this is a matter which is peculiarly for his discretion.]

Upon this intimation of the opinion of the Court, it was agreed that the cost of the two copies of the evidence taken at the inquest should be deducted.  
Rule accordingly.

**\*246]** **\*FULLALOVE v. PARKER.** *April 26.*

An objection that an attorney is not duly certificated should be taken before the master.

If made the subject of an application to the Court, it should at least be shown clearly that the party could not by the exercise of reasonable diligence have ascertained the fact in time to bring it to the master's attention.

GARTH, for the defendant, moved for a rule calling upon the plaintiff to show cause why he should not be disallowed his costs of this action (which were taxed on the 13th of February last), or why the matter should not be referred back to the master, on the ground that the plaintiff's attorney was not duly qualified. The alleged disqualification was this:—The attorney had two places of business, one at Croydon, and the other in London; and, instead of taking out a London certificate, had only obtained the lesser certificate applicable to country practitioners.<sup>(a)</sup> It was therefore submitted that he was precluded from recovering any costs, by reason of the 26th section of the 6 & 7 Vict. c. 73, which enacts that "no person who as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit, or any proceedings in any of the Courts aforesaid (s. 2), without having previously obtained a stamped certificate which shall be then \*247] in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as last aforesaid." [BYLES, J.—Has the client paid the attorney?] If he has not, he is not bound to pay him, and it cannot be recovered. [BYLES, J.—When did the fact come to the knowledge of the defendant?] Since the taxation: and an application was made to Keating, J., on the 20th of February; therefore there has

(a) The amount of duty where the attorney has been admitted three years or upwards, is 9*l.* if he reside within ten miles of the General Post Office, London, and 6*l.* if he reside at a greater distance; and half those sums respectively where he has not been three years admitted: see 16 & 17 Vict. c. 63, Sched.

The 23 & 24 Vict. c. 127, s. 19, enacts, that, "for determining the rate of stamp-duty payable on the certificate, the place or places where the attorney or solicitor shall carry on his business shall be deemed to be the place or places of his residence, within the meaning of the Acts relating to the stamp-duties on certificates."

And see the 25 G. 3, c. 80, s. 61, which provides that attorneys residing forty days or more in any one year within the limits where the higher duties are payable, shall become liable to them.

been no undue delay. All the costs were incurred in the action, and all the business was done within three miles of London.(a)

WILLES, J.(b)—I am of opinion that there should be no rule in this case. I do not come to this conclusion on the ground that there has been delay in the making of the application, but, because, after a taxation without any objection taken before the master, I am of opinion that it is too late to make the application in any form. Undoubtedly, if the plaintiff's attorney is uncertificated, he is disabled from recovering costs; and the plaintiff would not be entitled to recover for payments made in respect of services rendered by the attorney under such circumstances, except where he has made advances to his attorney without notice of his disability. Where such advances have been made, they cannot be recovered back; for, the debt is due, though the attorney is disabled from bringing an action to recover it. There is, however, another difficulty in the way of this motion. We must not be understood as at all intending to discourage applications of this \*kind: but I find this Court in a case of *Punter v. Lord Grantley*, 3 M. & G. 295 (E. C. L. R. vol. 42), 3 Scott N. R. 647, [\*248 lay down that which we consider to be a very convenient rule, viz., that this is an objection which should be taken before the master. The only ground that could be urged by Mr. Garth on this occasion was, that neither the defendant nor his attorney was aware of the attorney's position when the bill was under taxation. But I think his affidavit should have gone further, and should have shown that he could not by the exercise of reasonable diligence have made himself acquainted with the fact in time to avail himself of the point before the master. Upon this affidavit, it is clear that there has been no such reasonable diligence. I therefore think there is no ground for our interference.

BYLES, J.—I am of the same opinion. The case referred to by my Brother Willes shows that this was properly matter for the master, and not for the Court in the first instance. It may be, for anything that appears, that the attorney has received all the money from his client. When relief of this out of the way sort is asked, the party should at least be prepared to bring all the facts before the Court.

Rule refused.(c)

(a) See *Greene v. Reece*, 8 C. B. 88 (E. C. L. R. vol. 65).

(b) Erie, C. J., and Keating, J., were in attendance in the Court of Criminal Appeal.

(c) See *Meekin v. Whalley*, 4 M. & Scott 494 (E. C. L. R. vol. 30), 1 N. C. 59 (E. C. L. R. vol. 27), and *Humphreys v. Harvey*, 4 M. & Scott 500, 1 N. C. 62.

\*BARTLETT v. LEWIS. May 13. [\*249

It is no ground of objection to interrogatories under the 51st section of the Common Law Procedure Act, 1854, that the answers, if given in the affirmative, would render the party interrogated liable to a criminal prosecution, though it may be ground for refusing to answer.

*Semble*, that the statute does not in all respects place interrogatories upon the footing of bills for discovery in Courts of Equity.

Remarks upon *Osborn v. The London Dock Company*, 10 Exch. 698,† and *Tupling v. Ward*, 6 Hurlst. & N. 749.†

THIS was an action against the defendant as the acceptor of several bills of exchange. The defendant pleaded bankruptcy, and payment.  
C. B. N. S., VOL. XII.—11

*Honyman*, for the plaintiff, in Hilary Term last, obtained a rule calling upon the defendant to show cause why the plaintiff should not be at liberty to deliver interrogatories to the defendant pursuant to the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.(a) The object of the interrogatories was, to show that the defendant had been guilty of one of the offences specified in the 251st section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 \*250] Vict. c. 106.(b) and therefore that his certificate was \*void by s. 201. The application was founded upon an affidavit of the plaintiff which stated that the defendant had been insolvent in 1849; that, in January, 1855, he was adjudicated a bankrupt upon his own petition, but the bankruptcy was afterwards annulled; and that he was again adjudicated a bankrupt in June of the same year, and, in February, 1856, obtained a third-class certificate. The deponent also swore that very shortly after his bankruptcy the defendant was found to be in possession of large sums of money, under circumstances calculated to excite suspicion.

The matter had been before Byles, J., at Chambers; but the learned Judge refused to make any order.

The interrogatories proposed to be delivered were as follows:—

"1. When, after your bankruptcy in 1855, did you enter into or resume business? What was the business, and where did you carry it on?

\*251] "2. Did you not immediately or soon after \*obtaining your certificate, and, if so, when, open or reopen an account at Messrs. Rogers's bank, Clement's Lane, Lombard Street, in the city of London? Did you not then lodge a considerable sum to your credit? Did you deposit any, and what, security? State the day of opening such account, and of the first deposit of money and security. State the amount of the first deposit. Were not other large sums of money or securities lodged to your credit in the said bank within the ensuing three months? State the entire amount of the deposits or lodgments so made.

(a) Which enacts, that, "in all cases in any of the superior Courts, by order of the Court or a Judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of the Court or a Judge may at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter,) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions in writing, by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought, within the above time, or such extended time as the Court or Judge shall allow, shall be deemed to have committed a contempt of the Court, and shall be liable to be proceeded against accordingly."

(b) The 251st section enacts, that, if any person adjudged bankrupt, upon his examination "shall not discover all his real and personal estate, and how, and to whom, upon what consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto (except such part as shall have been really and bona fide before sold or disposed of in the way of his trade, or laid out in the ordinary expense of his family);" or "shall not deliver up to such Court all such part of such estate, and all books, papers, and writings relating thereunto, as shall be in his possession, custody or power (except the necessary wearing apparel of himself, his wife and children);" or "shall remove, conceal, or embezzle any part of such estate to the value of 10*l.* or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors,—every such bankrupt shall be deemed guilty of felony, and be liable to transportation for life, or for such term not less than seven years as the court before which he shall be convicted shall adjudge, or shall be liable to imprisonment, with or without hard labour, for any term not exceeding seven years."

"3. Did you soon after obtaining your certificate open or reopen an account with the Unity Bank, in London? State the date of opening or reopening the same, the amount of money or securities then lodged to your credit, and also the gross amount of the deposits or lodgments made during the ensuing three months.

"4. Have you not since your said bankruptcy opened accounts with other banks, and more particularly in Messrs. Gurney & Overend's, in the Bank of England, and in Messrs. Masterman & Co.'s bank? State the several banks in which you have so opened accounts, the time at which they were opened respectively, and the lodgments made to your credit on the opening of each.

"5. Did you not, on resuming business after your bankruptcy, enter on large transactions, requiring the command of considerable sums of money? and, did you not, in point of fact, a short time after your bankruptcy advance large sums of money in carrying on your business? State the amounts advanced by you within six months after you obtained your certificate in the said bankruptcy.

"6. What capital were you possessed of on so entering into business after your bankruptcy?

"\*7. Did you not soon after your bankruptcy advance a large sum of money on the bonds or other securities of the Rome [\*252 and Frascati Railway? When was such advance made, and what was its amount? Was all or any portion of this advance your own money?

"8. Did you not at or about the same time pay to the Swiss Bank a sum of 10,000*l.* or some other sum to guaranty the said railway securities, or for some other purpose? What amount did you so pay, and where?

"9. Did you not in the year 1858, or at some other time after your said bankruptcy, advance large sums of money to the Cork and Youghal Railway Company? What amount did you so advance, and when? Do you not hold a large amount of the stock, shares, debentures, or other securities of the said Company? Did you not on or about the 30th of August, 1861, at a meeting of the said Company, state that you were the principal owner of the stock of the said Company?

"10. Have you not recently bought from the Duke of Devonshire an estate for the sum of 80,000*l.*, or any other and what sum? When did you buy the same, and what purchase-money has been paid? Was it not paid out of your own moneys and on your own account?

"11. Were you within three months of obtaining your certificate in possession of a sum of 10,000*l.*, or, if not, of any sum exceeding 1000*l.*? If not, are you now in possession of the same? and at what period after the allowance of the said certificate were you first possessed of that amount?

"12. Did you not before your bankruptcy employ one William Tingay to dispose of Westminster bonds on your account? State as nearly as you can the amount of bonds so disposed of by the said William Tingay. Was not the said William Tingay in the [\*253 \*habit of offering the said bonds for sale by advertisement in the Times and other papers? and was not this done by your direction or with your sanction and consent?

"13. Had you not in the interval between June, 1852, and January, 1855, extensive dealings in bills of exchange with one George Hennett? State as nearly as you can the amount of the acceptances of Hennett which passed through your hands.

"14. Did you not receive from the said George Hennett acceptances to the extent of more than 40,000*l.*, for which you did not pay over to him any proceeds? Did you not pass away such bills and receive large sums of money on account of the same? Was not a dividend afterwards paid on them in the bankruptcy of the said George Hennett?

"15. Did not the assignees of the said George Hennett claim against you a sum of 53,000*l.*, or what other sum, on account of such transactions? Did you in the interim between your first and second bankruptcy compromise such claims for a sum of 1800*l.*, or what other sum?

"16. State as nearly as you can the actual amount received by you on account of the said bills of George Hennett?

"17. Was not William Tingay extensively employed by you in discounting bills and in disposing of securities?

"18. Did not the said William Tingay after your bankruptcy hand you over several sums of money or securities for money? State fully the particulars of the same.

"19. Did he not, especially, hand over to you several acceptances of Messrs. Rowland & Evans? When were such acceptances given \*254] to you? What was the \*gross amount of the same? How did you dispose of such acceptances, and for what value?

"20. Were you at any time known by the name of David Levi, or by any and what name different from that which you now bear? If so, upon what occasion, and for what purpose, and when did you assume the name of David Leopold Lewis? What name did your father bear?

"21. Has either of your sisters, since the date of your bankruptcy, handed over to you any money, securities, or property of any kind? If so, when, and to what amount? State all the particulars connected with the same.

"22. Have you since your resumption of business after your bankruptcy kept full and accurate books? Have you any book showing the amount of money employed by you in your business on its resumption? If so, where is such book?

"23. Can you state the dividend actually paid to your creditors under your bankruptcy?

"24. Did you not soon or at some time after your bankruptcy pay to one C. Bailey a sum which you were so indebted to him previous to such bankruptcy, or other any sum? What do you pay him? Give the date particularly.

"25. Did not the said C. Bailey thereupon return to you the securities which he so held? What was the value of the securities so returned? How did you dispose of the same, and when, and for what amount?

"26. Did you soon or at any time after your bankruptcy pay to John Pickersgill, or Messrs. Pickersgill & Co., any and what sum of money on account of a debt due by you to him or them, or did you make any arrangement with him relative to such debt? Did he give up to you any securities held by or deposited with him? State fully \*255] all the particulars of such payment \*or arrangement, and the date of the same. State also the several securities handed over to you by him, the value of the same, and how, and when, and for what amount you disposed of the same.

"27. Did you at any time say to one G. Bruge, or to any one else, that your sister had lent you a sum of 20,000*l.*, or any other sum? If so, was that statement true?

"28. Had you previously to your bankruptcy any dealings with a German Jew named Kremiller, residing in Red Lion Square, Holborn, or elsewhere? Did you obtain from him any watches or other goods, and, if so, to what amount?

"29. Did you use or employ any other name in carrying out the transaction? If so, under what name did you carry out the same? State fully all particulars connected with such transaction."

The ground upon which Mr. Justice Byles declined to allow the above interrogatories at Chambers, was, that the Court of Exchequer had in a recent case of *Tupling v. Ward*, 6 Hurlst. & N. 749,† held that interrogatories should not be allowed, the answers to which in the affirmative would tend to criminate the party. [WILLES, J.—There are two cases in the Exchequer the other way, viz. *Boyle v. Wiseman*, 10 Exch. 647,† and *Osborn v. The London Dock Company*, 10 Exch. 698,† one in this Court, viz. *Chester v. Wortley*, 17 C. B. 410 (E. C. L. R. vol. 84), and one in the Queen's Bench, viz. *Carew v. Davis*, 5 Ellis & B. 709 (E. C. L. R. vol. 85). The exceptional case of *Tupling v. Ward* was a very peculiar one.]

*Hawkins*, Q. C., and *Hannen* now showed cause.—The current of the authorities upon this subject in the common law Courts, until the recent case of *Tupling v. Ward*, 6 Hurlst. & N. 749,† has had a tendency to destroy one of the features of our jurisprudence, which \*has always distinguished it in a marked manner from that of all other civilized countries, viz. that a man shall not be asked [\*256 questions his answers to which will tend to criminate him. In *Maccallum v. Turton*, 2 Y. & J. 183,† the Court of Exchequer (on the equity side) refused to compel a defendant to answer allegations which *might* subject him to penalties; and it was held that this protection extended not only to the question which might tend directly to criminate him, but to every link in the chain of proof. Lord Chief Baron Alexander, in pronouncing judgment, refers to the language of Lord Eldon in *Paxton v. Douglas*, 19 Ves. 225, where that learned Judge says: "In no stage of the proceedings can a party be compelled to answer any question accusing himself, or any one in a series of questions that has a tendency to that effect; the rule in those cases being, that he is at liberty to protect himself against answering not only the direct question, whether he did what was illegal, but also every question fairly appearing to be put with a view of drawing from him an answer, containing nothing to affect him, except as a link in a chain of proof that is to affect him." That is precisely in point. [WILLES, J.—In *Chester v. Wortley*, 17 C. B. 410 (E. C. L. R. vol. 84), this Court held that interrogatories may be administered in an action of ejectment, even though brought to enforce a forfeiture.] The judgment there proceeded (and with apparent reluctance) upon the authority of *Osborn v. The London Dock Company*, 10 Exch. 698:† and that case was considered in *Tupling v. Ward*, and virtually overruled. There, the Court of Exchequer refused to permit the plaintiff, in an action for libel, to exhibit interrogatories to the defendant, the answers to which, if in the affirmative, would tend to show that he composed

or published the libel, and would therefore criminate him. Martin, \*257] B., in delivering the judgment of the \*Court, says: "We are all of opinion, that, in the exercise of the authority and discretion given to us by the 51st section of the Common Law Procedure Act, 1854, such interrogatories ought not to be allowed. It was scarcely contended that the defendant was bound to answer them: but it was urged that the interrogatories ought to be administered, leaving the defendant to refuse to answer them if he thought fit. Without laying down any general rule on the subject, we think, that, in cases of this kind, it would be unfair to submit questions which a party is clearly not bound to answer; the object being to compel him to answer when not bound, or to refuse, and so create a prejudice against him. We therefore think that these interrogatories ought not to be allowed." [ERLE, C. J.—The language of the judgment is very guarded.] It is idle to allow interrogatories which the Court must know will not be answered, and which are administered without a hope of their being answered, and for the mere purpose of prejudicing the party with the jury. [ERLE, C. J.—A man is not to be punished upon his own forced admission of guilt. If he has been guilty of swindling short of an indictable offence, he must answer: but, if he has overstepped the line, he is privileged from answering. I must confess I do not see why a guilty man should not be prejudiced in the eyes of a jury. BYLES, J.—All these interrogatories are questions which, as questions, might be put to a witness at Nisi Prius.] No doubt: but there is no analogy between interrogatories under the statute and the examination of witnesses at Nisi Prius. By the statute, the party may be interrogated "upon any matter as to which discovery may be sought." In Mitford's Equity Pleading 124 (5th edit. 229), the result of the cases is thus given,—"*\*258* that no one is bound to answer so as to subject himself to \*punishment, in whatever manner the punishment may arise, or whatever may be the nature of the punishment. If, therefore, a bill requires an answer which may subject the defendant to any pains or penalties, *he may demur to so much of the bill.* As, if a bill charges anything which, if confessed by the answer, would subject the defendant to any criminal prosecution, or to any particular penalties, as, an usurious contract, maintenance, champerty, simony. And, in such cases, if the defendant is not obliged to answer the facts, he need not answer the circumstances, though they have not such an immediate tendency to criminate." And numerous authorities are cited in support of these positions. The demurrer was not upon oath: it was only signed by counsel. But at Nisi Prius, you have no right to presume before a witness is sworn that improper questions will be put to him: *Boyle v. Wiseman*, 10 Exch. 647:† and, once sworn, all his answers are upon oath. Lord Eldon, in *Lloyd v. Passingham*, 16 Ves. 59, 69, says: "I cannot in a Court of justice hold that a party demurring to answer a criminal charge, that is to be taken as an admission." In *Thorpe v. Macauley*, 5 Madd. 218, 229, which was a bill for discovery, the Vice-Chancellor (Sir John Leach) says: "The sole object of the bill is, to prove the truth of the libel; or, in other words, to prove the truth of the criminal matters charged. Every question asked must necessarily be with a view to that end, and tend

to that point; and a party is not bound to answer any question, however apparently indifferent, which is in any manner connected with the criminal charge." And the demurrer was allowed. *Billing v. Flight*, 1 Madd. 230, is to the same effect. [WILLES, J.—Are not those cases inconsistent with *Short v. Mercier*, 3 M'N. & G. 205, before Lord Truro?] There, the defendant had answered, and so got himself into the difficulty. If the \*objectionable matter appears upon the face of the bill, the objection to it must be taken by demurrer: if not, it must come by way of answer. If the Court is to be bound in these cases, as it is confidently submitted it is, by the rules of the Court of equity, these interrogatories are plainly such as the defendant could not be called upon to answer. This was not gone into in *Chester v. Wortley*. And *Osborn v. The London Dock Company* cannot any longer be considered an authority. Baron Alderson's dictum there has been repudiated: per Lord Campbell, in *Whateley v. Crowther*, 5 Ellis & B. 709 (E. C. L. R. vol. 85).

*Bovill, Q. C.*, and *Honyman* were not called upon to support the rule.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The interrogatories are sought to be administered under the 51st section of the Common Law Procedure Act, 1854, which enacts, that, "in all causes in any of the superior Courts, by order of the Court or a Judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of the Court or a Judge may at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter), interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions in writing, by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought, within the above time, or such extended \*time as the Court or a Judge shall allow, shall be deemed to have committed a contempt of the Court, and shall be liable to be proceeded against accordingly." This is an action brought for the recovery of an alleged debt. The defendant has pleaded his discharge under the Bankrupt Act: and the question is whether that is a valid discharge. The interrogatories proposed to be delivered bear directly upon the matter in issue; and the 51st section decidedly authorizes the questions to be put. The spirit of the enactment is, to enable the party interrogating to get at the truth, and to prevent a failure of justice from its undue concealment. These interrogatories bear upon what perhaps may render the party interrogated liable to be proceeded against criminally: but, though some of them may be very likely to lead up to it, none of them in terms asks the party whether he has been guilty of an indictable offence. Taking the interrogatories as they stand, I do not think they are rendered inadmissible by reason of any statement contained therein. It is clear, and indeed was almost conceded, that every one of the questions might be put to the party if he were in the witness-box: and, if he then chooses to swear that his

answers will render him liable to be criminally proceeded against, he may protect himself from that dilemma by declining to answer. But, independently of that privilege, the interests of truth and justice must be allowed to prevail. I know of no principle of law which should protect a man who has been guilty of an indictable offence from being placed in this predicament, any more than one whose fraud and dishonesty just fall short of rendering him criminally responsible. I entirely differ from the proposition put forth by Mr. *Hannen*, that the inference which a jury might naturally be expected to draw from \*261] the party's refusal to answer the interrogatories \*affords a reason why they should not be permitted to be put. Although I always listen to his arguments with a great deal of interest, he has failed upon this occasion to satisfy me that he is well founded. It is the proper province of the law to bring all frauds to the light: and I cannot think a man is more deserving of sympathy and protection because his iniquities come up to the indictable point. Nor do I infer from the language of the 51st section that it was intended that the practice of the Courts of Equity was to regulate us. It provides that interrogatories may by order of the Court or a Judge be delivered "upon any matter as to which discovery may be sought." I think the legislature has cautiously abstained from limiting the power of administering interrogatories to cases where a bill for discovery will lie. The authorities, I think, fully warrant us in going the length to which I propose to go upon this occasion. *Osborn v. The London Dock Company*, 10 Exch. 698,† is precisely in point. The application there was opposed on the ground, that, if the plaintiff was a party to such fraudulent practices as those sought to be established by the answers to the interrogatories, he would be liable to be indicted; and that the right to interrogatories under this statute was confined to cases where a discovery might have been obtained in a Court of equity. But Parke, B. said: "The language of the 51st section is much more extensive in its signification, and has no such limitation as that contended for. The 50th section, which empowers the Court to order the production of documents, says that it shall be done upon the affidavit of the party applying for the document, 'to the production of which he is entitled for the purpose of discovery or otherwise.' And the 51st section says that the party may be interrogated 'upon any matter as to which discovery may be sought.' It does not say that \*262] 'the power is limited to cases in which 'a bill of discovery will lie.'" In *Tupling v. Ward*, 6 Hurlst. & N. 749,† all that Martin, B., in delivering the judgment of the Court, says, is, that, without laying down any general rule on the subject, they think, that, in cases of *that* kind, it would be unfair to submit questions which the party clearly was not bound to answer; the object being, either to compel him to answer when not bound, or to refuse, and so create a prejudice against him. What precise limitation the Court meant to impose upon the rule laid down in *Osborn v. The London Dock Company*, I know not: but I think they did not intend to overrule it. *Osborn v. The London Dock Company* was acted upon by this Court in *Chester v. Wortley*, 17 C. B. 410 (E. C. L. R. vol. 84), and I am disposed to act upon it likewise. Upon the whole, I think the interrogatories in question may properly be delivered.

WILLES, J.—I am of the same opinion. It is only necessary to look at the frame of the 51st section to see that it was intended that this new jurisdiction should be administered in the Courts of law by analogy to their own proceedings, and not to the practice of the Courts of equity. The framers of the Act evidently did not intend that we should be fettered by the rules of equity.<sup>(a)</sup> Upon a careful consideration of its \*language, I think the 51st section will be found expressly to [263 exclude the difficulties which, as appears from the treatises on the law of discovery by Sir James Wigram and Mr. Hare, so frequently arose in Courts of equity, as to whether an objection of this nature should be made on demurrer or come by way of answer. The party interrogated is by the very terms of the section placed in the position of a witness. Now, if such questions as these were put to a witness, the witness, in order to excuse himself from answering them, must make out to the satisfaction of the Court that he would be in peril of a criminal prosecution if he were compelled to answer them. Upon this ground, it appears to me, that, even admitting that the interrogatories are put for the purpose of extracting answers which may criminate the party, or of prejudicing him in the estimation of the jury if he declines to answer them, they ought to be allowed to be put. I must own that I have no sympathy with a witness who is compelled, in order to protect himself from answering a question, to admit that his answer would tend to criminate him. This view of the law was acted upon by the Court of Exchequer in the case of *Osborn v. The London Dock Company*, 10 Exch. 698,† and again by this Court in *Chester v. Wortley*, 17 C. B. 410 (E. C. L. R. vol. 84). But it is said that those cases have been overruled by the recent case of *Tupling v. Ward*, 6 Hurlst. & N. 749.† I apprehend, however, that that is not so. If that case proceeded upon the notion that the Courts of equity will not allow discovery in the case of a libel, it is not well warranted. In *Hare on Discovery* 116, it is said: "It is no objection to a bill for discovery, that the matter \*in question might have [264 been the subject of an indictment or information. An action for damages having been brought against the author of a libel, a bill was filed for the discovery of evidence in support of a plea of justification. It was objected that the bill admitted the authorship of the libel; that, whether true or false, it was an indictable offence; and the plaintiff, therefore, by his own showing, came to the Court to protect himself against the consequences of his crime. But it was held, that, if the plaintiff at law thought fit to treat the conduct of the defendant as a civil injury only, it was but just that the same course of defence should be open to him which was open to other defendants in civil suits. It is no objection that the action proceeds *ex delicto*. No such limitation of the jurisdiction as to discovery is hinted at in any book

(a) The Common Law Commissioners, in their Second Report (1853), p. 35, say,—“We assert as an indisputable proposition, that every Court ought to possess within itself the means of administering complete justice within the scope of its jurisdiction. The necessity of resorting to a Court of equity for discovery involves fresh process, much delay, and additional expense; the greater part of which might be avoided by causing the necessary proceedings to be had in the Court in which the suit is already pending. It is true the Courts of law do not at present possess any machinery analogous to that of a bill of discovery. But we think it would be an additional advantage to get rid of so cumbersome and expensive a mode of proceeding; and we see no difficulty in devising a simple but efficacious mode of attaining the end desired.”

of practice, or by the dictum of any Judge. Courts of equity exercise a direct jurisdiction in matters of waste and public nuisance, which are *ex delicto*. I am not, therefore, prepared to say that a Court of equity will refuse its ordinary aid to the parties in any action at law proceeding for a civil remedy:’ per Sir John Leach, V. C., in *Thorpe v. Macauley*, 5 Madd. 230. The same principle was affirmed by Lord Eldon in *Macauley v. Shakel*, 1 Bligh, N. S. 96. The Court could only consider it as an *alleged* libel, and, whatever might be the nature or character of such an alleged libel, the Court must assist a plea of justification. It was observed by Lord Eldon, that, in the *Exchequer*, it was the practice with underwriters, when policies of insurance were found to be affected with gross frauds, to bring the assured into Court and compel them to answer, by pleading frauds which would have been indictable.” I entirely agree with my Lord that we must proceed under this statute according to our own practice, and are not \*265] to be governed by that of the \*Courts of equity. All that *Tupling v. Ward* amounts to is this, that, under the peculiar circumstances of that case, the Court did not consider it one in which the interrogatories should be allowed. I think that is to be treated as an exceptional case.

BYLES, J.—I concur in the judgment of the rest of the Court, but mainly upon the authority of *Chester v. Wortley* and the respect I feel for the opinions of my Lord Chief Justice and my Brother Willes. I must confess I thought the words of the 51st section “upon any matter as to which discovery may be sought” referred to the discovery which was enforceable by a bill in equity, and that they implied that the party could only be interrogated as to matters which he would have been compelled to answer upon a bill filed for that purpose. It was for that reason I declined to allow these interrogatories at Chambers. The case of *Tupling v. Ward* was not brought before me. If this were *res integra*, I should incline to concur with what Baron Martin says there, though I do not concur with some of the observations which have been made as to the nature and the reasons for the privilege which a witness has to protect himself from answering as to matters having a tendency to criminate him. The rule was intended for the protection of the innocent, and not for that of the guilty. But, for the reasons already given, I agree with the rest of the Court that the interrogatories in question are such as may be delivered,—leaving the defendant to answer them or not as he may be advised.

KEATING, J.—I agree that these interrogatories may properly be allowed. They all appear to me to be strictly relevant to the question raised upon the record, the issue being whether or not the certificate was valid. \*266] \*All the questions are questions tending to show that the bankruptcy of the defendant was a fraudulent bankruptcy, and that the certificate obtained under it is no bar. I think it is no answer to the application to say that the answers to the questions if given one way may tend to criminate the party interrogated, by showing that he has been guilty of an indictable offence. We are not to assume that he cannot answer them without admitting his guilt, or that he will claim protection from answering them. The mode of questioning by interrogatories is infinitely more favourable

for the party than the ordinary cross-examination in the witness-box. In the latter case, he has to exercise his discretion on the spur of the moment; whereas, in the former, he has time for deliberation and for obtaining professional assistance to enable him to determine to what extent he may safely answer, and his answers may be accompanied by explanations which could hardly be given in Court. If this matter had come before me at Chambers, I should have felt great difficulty in taking upon myself to decide it. But, upon the whole, I am glad it has been disposed of in the way it has been, inasmuch as the allowing the interrogatories to be put is calculated to further the purposes of justice, and cannot in my opinion unduly prejudice the defendant.

Rule absolute.(a)

(a) See the next case : and see *Scott v. Miller*, 1 Johnson 220.

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\*WHITE v. WATTS and Others. May 13. [\*267

Interrogatories may be delivered on an interpleader issue.

CERTAIN goods having been seized by the sheriff of Devonshire under a fi. fa. at the suit of Watts and others against The South Devon Iron and General Mining Company, Limited, a claim was made by one Lynch White under an alleged mortgage of the goods to him by the Company. The sheriff thereupon took out an interpleader summons, which was attended before Bramwell, B., on the 7th of April last, when an issue was directed. The issue as settled and approved between the parties was as follows :—

“In the Common Pleas.

“The third day of May, in the year of our Lord one thousand eight hundred and sixty-two.

“London. Lynch White affirms, and William John Watts, John Whidborne, and Robert Moir deny, that certain goods and chattels seized and taken in execution by the sheriff of Devonshire under a writ of fieri facias tested the 22d of March, 1862, and issued out of Her Majesty's Court of Common Pleas, directed to the said sheriff, and delivered to him on the 22d of March, 1862, for the having of execution of a judgment of that Court recovered by the said William John Watts, John Whidborne, and Robert Moir, in an action at their suit against the South Devon Iron and General Mining Company, Limited, or some part thereof, were at the time of the said seizure by the said sheriff the property of the said Lynch White, as against the said William John Watts, John Whidborne, and Robert Moir: and it has been ordered by the Honourable Mr. Baron Bramwell, pursuant to the statutes 1 & 2 W. 4, \*c. 58, and 1 & 2 Vict. c. 45, that the said question shall be tried by a jury. Therefore let a jury [\*268 come, &c.”

*Cole*, on a former day in this term, on the part of the defendants, obtained a rule to show cause why they should not be at liberty to deliver interrogatories to the claimant pursuant to the 51st section of

the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.(a) The application had been made before Williams, J., at Chambers, when it was objected on behalf of the claimant that an interpleader issue was not a "cause" within the meaning of the 51st section of the Common Law Procedure Act; whereupon the learned Judge referred the parties to the Court. *Cole* submitted that the words of the 51st section, which were held in *Chester v. Wortley*, 17 C. B. 410, and *Flitcroft v. Fletcher*, 11 Exch. 543,† to extend to ejectment, were large enough to embrace interpleader issues. [BYLES, J.—You clearly might have discovery of documents under s. 50.] In *Metcalf v. Hervey*, 1 Ves. sen. 248 (cited in *Hare on Discovery* 204), discovery was allowed on a bill in the nature of an interpleading bill.

*David Keane* now showed cause.—To hold that an interpleader issue is within the 51st section of the Common Law Procedure Act, 1854, would be altogether repugnant and inconsistent with the language of that section. It enacts, that, "in all *causes* in any of the superior Courts, by order of the Court or a Judge, the plaintiff may *with the declaration*, and the defendant may *with the plea*, or either of them by leave of the Court or a Judge may at any other time,"—that is other than the time of the delivery of the declaration or the plea—"deliver to the opposite party interrogatories in writing," &c. An issue under \*269] the Interpleader Act is not a "cause;" and there is neither writ, declaration, or plea, but a mere issue drawn up and agreed between the parties. [WILLES, J.—There is a writ: see 8 & 9 Vict. c. 109, s. 19, and *Luard v. Butcher*, 2 C. B. 858 (E. C. L. R. vol. 52)]. There certainly is no writ in this case. The strongest case against me is *Withers v. Parker*, 4 Hurlst. & N. 810,† where the right of appeal given by the 34th section of the Common Law Procedure Act, 1854, was held to apply to a feigned issue under the Interpleader Act. After referring to *King v. Simmonds*, 7 Q. B. 289 (E. C. L. R. vol. 53), and *Snook v. Mattock*, 5 Ad. & E. 239 (E. C. L. R. vol. 31), where it was held that error would not lie upon a feigned issue, and to the 34th and 35th sections of the statute, Wightman, J., says: "Long before the case is ultimately decided, a Court of error may entertain the question whether the verdict ought to be entered upon the point reserved, or a new trial granted; and that is equally applicable to interpleader issues as to other suits. The Court of appeal simply gives such judgment as to entering the verdict or granting a new trial, as ought to have been given in the Court below. For these reasons, I am of opinion that the case of an appeal is clearly distinguishable from that of a writ of error; and that it was intended by the legislature to give a right of appeal in all cases of rules within the 34th section." And Erle, J., says: "I am also of opinion that this appeal lies. The Act is divided into chapters. The 1st section provides for the trial of any issue in fact by the Court or a Judge. From the 3d to the 17th section is a chapter relating to compulsory arbitration. The sections from the 18th up to the 35th relate to the trial of causes. It seems to me that the legislature foresaw the objection now taken, and, intending to meet it, have used words which apply to other than personal actions. They say, 'upon the trial of any cause,' that is,

(a) See the section, ante, p. 249.

upon any trial which can \*come legitimately before a Court of common law. The same language is found in the 19th section, [\*270 which empowers the Court to adjourn a trial. Then there are enactments as to the substitution of an affirmation for an oath; as to witnesses, the stamp on documents, and a variety of other provisions, until we come to proceedings after the trial. Then a power of appeal is given; and then there are enactments which regulate it until the rule is finally disposed of. I think that the legislature intended to give the same remedy in an interpleader as in any other suit. The language applies,—‘upon the trial of any cause,’—an interpleader cause as well as any other cause. The mischief to be remedied is as great; for, most important rights may be decided in an interpleader cause. The reason, therefore, for the enactment applying and the words applying to an interpleader cause, I am of opinion that in such case an appeal lies. No doubt there are several sections which cannot be of universal application. The legislature has provided a single enactment for a great variety of cases. Some of the provisions are applicable solely to plaintiffs, and some to defendants; but I am clearly of opinion that this case is within the Act.” There is abundant reason, therefore, for holding a feigned issue to be within the appeal clause, which can have no application to the case of interrogatories. In *King v. Simmonds*, 7 Q. B. 811 (E. C. L. R. vol. 58), Tindal, C. J., in delivering the judgment of the Court of error, says: “In effect, the feigned issue, and the judgment thereon, is no more than an interlocutory proceeding in another suit, in the nature of an interlocutory judgment wherein the Court are subsequently to act in disposing of the rights of parties; and it has already been decided that the judgment so called in the 2d section (of the 1 & 2 W. 4, c. 58) is not a judgment to be entered on record in the ordinary way, but in the special manner pointed out in \*the 7th section.” This is [\*271 not a “suit” or a “cause.” There is no writ to found it; no judgment given in it: the judgment is on a claim in a different suit. [WILLES, J.—How do you define a “cause?” Is an interpleader bill a “suit?”] A cause is a judicial proceeding founded (in a Court of common law) upon a writ of summons. [WILLES, J.—No. That is the definition given by the framers of the Common Law Procedure Act to “action.”] Then, it is a proceeding in which there may be a final judgment. [BYLES, J.—A plaintiff and a defendant, and a matter in dispute between them. Is not that a “cause?”] It is in the original suit that the parties are acting here. The claimant in the interpleader summons states his title on oath before the Judge. Interrogatories, therefore, are not needed. It is not within the language of the statute; nor is it at all analogous to proceedings in ejectment. Ejectment is a cause, in which there is a judgment, and on which error will lie.

*Cole* was not called upon to support the rule.

ERLE, C. J.—I am of opinion that the rule must be made absolute. The question is, whether an issue under the Interpleader Act is within the 51st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which enacts that, “in all *causes* in any of the superior Courts, by order of the Court or a Judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them

by leave of the Court or a Judge may at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to \*272] which discovery may be sought," &c. No definition or \*interpretation of the word "cause" is given in the statute. But I do not see why it should not embrace an interpleader issue. The importance of learning the truth is as great in an interpleader as in any other case. There are two parties, and there is a matter in dispute. As was pointed out by my Brother Wightman in *Withers v. Parker*, 4 Hurlst. & N. 810,† the 50th and 51st sections are in pari materia. Now, s. 50 speaks of "any cause or other civil proceeding in any of the superior Courts:" and, when s. 51 speaks of "*all causes* in any of the superior Courts," it must mean the same as "civil proceedings" in s. 50.

The rest of the Court concurring,

Rule absolute.

### DE ROO and Another v. FOSTER. May 5.

A replication, "on equitable grounds," to a plea of infancy, that the defendant fraudulently contracted the debt by means of a false and fraudulent representation that he was of full age, is bad, on the ground of departure, and disclosing no answer in equity.

THIS was an action for goods sold and delivered by the plaintiffs to the defendant, for goods bargained and sold, for work and labour, for money lent, money paid, money received, for interest, and for money found due upon accounts stated.

The defendant (by guardian) pleaded, that, at the time of the accruing of the supposed causes of action, he was an infant within the age of twenty-one years.

To this plea the plaintiff replied, "on equitable grounds," that the defendant fraudulently contracted and incurred the several debts in the declaration mentioned with the plaintiffs, and caused and induced \*273] the plaintiffs to make and enter into, perform, \*and fulfil the several contracts with him whereby the several debts were contracted, incurred, and created by falsely and fraudulently and expressly representing to the plaintiffs, and thereby inducing them to believe before and at the several times of making the said contracts and contracting and creating and incurring the said several debts, that he the defendant then was of full age, and not an infant; the defendant then well knowing that he was an infant within the age of twenty-one years, that is to say, of twenty years old; and that the plaintiffs were ignorant that the defendant was an infant, until after the said several debts had accrued.

To this replication the defendant demurred, the grounds of demurrer stated in the margin being,—“that the replication is a departure, as it admits that the debt sued for never was a legal debt, but only an equitable claim which would have made a bad declaration; that a Court of law would have to give, and to give without inquiring into the circumstances, judgment for the amount due according to the contract, when a Court of equity would consider whether the debt was

of such a nature as ought to be enforced, and whether the whole ought to be enforced or only a reasonable amount, for though an adult may bind himself to pay 100*l*. for what is only worth 100*s*., yet a Court of equity would take all the circumstances of the case into consideration, and would only enforce payment of what is equitable; that no one ought to rely on the representations which the other makes as to his majority, and even a Court of equity would consider not only whether the plaintiffs were deceived, but whether they ought to have been deceived; and that equity would only enforce payment out of the infant's property, at least during infancy."

*Watkin Williams*, in support of the demurrer.—The \*replication is clearly bad for departure, and also as not being warranted by the 85th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. *Bartlett v. Wells*, 31 L. J. Q. B. 57, is precisely in point. There, to a declaration for goods sold and delivered, the defendant pleaded infancy; to which the plaintiff replied, on equitable grounds, that, at the time of contracting the debt, the defendant, knowing his true age, falsely and fraudulently represented that he was of full age, whereby the plaintiff (having no knowledge or means of knowledge as to the defendant's age) was induced to enter into the contract and supply the goods: and it was held that the replication was bad as a departure, and also as not alleging facts to avoid the defendant's plea on equitable grounds within the 85th section of the Common Law Procedure Act, 1854. Cockburn, C. J., there says: "The replication affords no answer to the plea either at law or equity, and is moreover a departure. The best way of testing this, is, to see whether, on the declaration, plea, and replication, taken together, the plaintiff makes out any cause of action; and, taking the whole together, it appears that the defendant, being a minor, represented himself to be of full age, and by that representation induced the plaintiff to enter into a contract which the defendant has failed to perform. Now, if that had been stated in a declaration, would it have been maintainable in an action at law? Clearly not, on the authorities; and even in equity this replication would not have been an answer to a defence of infancy set up in answer to a bill founded on the contract, say, for specific performance. The plea is not displaced nor got rid of by the replication. It may well be, that, in respect of the fraud, equity would have afforded some sort of relief; but that is simply relief founded on the ground of fraud; and in all the cases which were or \*can be cited, the suit was against the infant in respect of the fraud. It appears to me therefore clearly that the decisions in equity do not touch the matter, nor show that fraud is an answer to a plea of infancy, which, both in law and equity, is a defence to any proceeding on the contract. Granted that equity may compel the infant to make restitution: but that at once converts the action from an action on the contract to one in tort." And Crompton, J., says: "It is well established, that, in the case of infants and married women, where the tort is connected with a contract with the infant or married woman, the fraud does not prevent the incapacity to contract being a defence to an action; and the same principle applies to a defence under the Statute of Limitations: fraudulent concealment is no answer to such a defence. The case of *Wright v. Leonard*, 11 C. B. N. S. 258

(E. C. L. R. vol. 103), is a strong instance of this doctrine, in which my Brothers Williams and Willes differed from Erle, C. J., and Byles, J., as to the application of the principle to the particular facts of the case, but not at all as to the principle itself." [WILLES, J., referred to *Price v. Hewett*, 8 Exch. 146,† and *The Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422.†]

*J. Brown*, contra.—It must be conceded that the case of *Bartlett v. Wells* is not distinguishable from the present. But it is submitted that the Court there proceeded upon a mistaken notion of the ground upon which the Courts of equity proceed. The ground on which the Court of Queen's Bench decided *Bartlett v. Wells*, was, that there the action was by the facts alleged in the replication turned into an action for the fraud; whereas, the Court of equity proceeds upon the principle that the infant ought not to be allowed to set up his own fraud. It was upon this ground that the \*creditor, in *Ex parte* \*276] the *Unity Bank*, in *re King*, 27 *Law J.*, *Bankruptcy* 33, was allowed to prove against the estate of an infant, where the latter had obtained credit by means of a fraudulent representation that he was of full age. "Here was a case," says Lord Justice Knight Bruce, "where a young man, who from his appearance might be taken to be more than twenty-one years of age, was found carrying on business. He was desirous of borrowing money for the purposes of his business, and with that object in view he represented himself as twenty two years old: he expressly and solemnly declared that to be his age. Upon the faith of this fraudulent misrepresentation, he procured money from the petitioners, and subsequently he had become a bankrupt. The only question for us is, whether in equity,—setting aside whether he was or was not liable at law,—whether in equity he had rendered himself liable in respect of the debt so contracted: and in my opinion he has clearly done so."

ERLE, C. J.—*Bartlett v. Wells* is precisely in point: and the only proper way of bringing it in question is by taking it to a Court of error.

The rest of the Court concurring,

Judgment for the defendant.

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\*WATKINS v. CLARK. May 5.

To an action for non-payment of 45*l.*, the balance due upon a building agreement, the defendant pleaded a set-off of a judgment for 40*l.* 2*s.* obtained by him in an action against the plaintiff. To this plea the plaintiff replied, that, before the recovery of the said judgment, he for a good consideration assigned the debt of 45*l.* to one J. S.; that the defendant before the recovery of the judgment had notice of the assignment; and that he (the plaintiff) was suing as trustee for J. S.:—Held, that the replication was bad, as disclosing no legal answer to the plea.

THE declaration stated, that, by a certain deed made and entered into by and between the plaintiff and the defendant, the plaintiff (amongst other things) covenanted and agreed with the defendant that he the plaintiff would, at his own costs and charges, erect, build, and completely finish, with good and proper materials of every description, in a workmanlike and substantial manner, fit for habitation and

use in every respect, upon each of two certain plots or parcels of ground in the said agreement mentioned, one brick messuage or dwelling-house of the full-sized fourth rate or class of building, according to certain stipulations therein mentioned: and the defendant thereby, for the consideration therein mentioned, did thereby covenant, promise, and agree to and with the plaintiff (amongst other things) that he the defendant should and would well and truly pay to the plaintiff the sum of 200*l.*, at the times and in manner following, viz. the sum of 40*l.*, part of such sum of 200*l.*, when and so soon as the first-floor joists of each of the said messuages should have been laid down and fixed, the sum of 20*l.*, further part thereof, when and so soon as the second-floor joists of the said two messuages should have been laid down and fixed, the sum of 20*l.*, further part thereof, when and so soon as the ceiling-joists of the said two messuages should have been laid down and fixed, the sum of 40*l.*, further part thereof, on the completion of the carcasses of the said two messuages, the sum of 20*l.*, further part thereof, on the completion of the plastering and laying of the floors of the said two messuages, the sum of 20*l.*, further part thereof, when the sashes should be glazed and hung and doors \*com- [\*278 pleted and hung, and the sum of 40*l.*, residue of such sum of 200*l.*, when the said two messuages should have been completed and fit for occupation, and the drains and gutters completed, pavement laid, and garden walls and fences completed: Averment, that the plaintiff did before the commencement of this suit erect, build, and completely finish, with good and proper materials of every description, in a workmanlike and substantial manner, fit for habitation and use in every respect, such two messuages or dwelling-houses as aforesaid, and that the same were fit for occupation, and the drains and gutters completed, pavement laid, and garden walls and fences completed before the commencement of this suit; and that all conditions precedent and all necessary things had been done and performed and had happened, and all necessary times had elapsed, to entitle the plaintiff to payment of the said sum of 200*l.*, and to maintain this action: Breach, that, although the defendant did pay to the plaintiff divers sums of money for and on account of certain of the said instalments of the said sum of 200*l.*, yet he did not nor would pay to the plaintiff the whole of the said sum of 200*l.*, but made default therein, and 45*l.*, part thereof, was and still is due and in arrear from the defendant to the plaintiff.

Second plea, except as to the said sum of 5*l.* parcel, &c., by and from the first plea excepted, that the plaintiff, at the commencement of this suit, was and still is indebted to the defendant in an amount equal to the plaintiff's claim, except as aforesaid, for money payable by the plaintiff to the defendant upon and by virtue of a certain judgment which the defendant on the 21st of August, 1861, in the Court of Queen's Bench recovered against the plaintiff in a certain action, and whereby he by the judgment of the said Court recovered against the plaintiff the sum of 40*l.* 2*s.* \*for his costs of suit, whereof the plaintiff was convicted, and of which said judgment the de- [\*279 fendant had not obtained any execution or satisfaction, and which said judgment still remained in full force and effect; and for money found to be due from the plaintiff to the defendant on accounts stated be-

tween them, which amount the defendant was willing to set off against the plaintiff's claim, except as aforesaid.

Replication to the second plea,—that, before the recovery of the said judgment and the accruing of the alleged causes of set-off in the second plea mentioned, by deed made between the plaintiff and one F. R. Smith, he the plaintiff, for a good and valuable consideration, did grant, assign, transfer, and set over unto the said F. R. Smith the said debt or sum of 45*l*. due and owing from the defendant to the plaintiff in the said declaration mentioned, and all powers and remedies vested in the plaintiff for recovering and obtaining payment thereof, to have, receive, and take the said debt or sum of 45*l*. unto the said F. R. Smith upon trust to receive the said debt or sum of money, and thereout to retain or reimburse himself all costs, charges, and expenses sustained or incurred in obtaining or compelling payment of the said debt or sum of money, or in anywise relating thereto, and then to pay and satisfy unto himself the said F. R. Smith all such sums as were then due and owing from the plaintiff to the said F. R. Smith, including the preparation and completion of the said deed, with interest for the same after the rate of 5*l*. per centum per annum from the date thereof until full payment, and to pay the residue of the same debt or sum unto the plaintiff: that the defendant, before the recovery of the said judgment, and the accruing of the said alleged causes of set-off, had notice of the said deed and of the said assignment of the said debt or sum of 45*l*. by the plaintiff to the  
\*280] \*said F. R. Smith; that, before and at the time of the making of the said deed, there were due and owing from him the plaintiff to the said F. R. Smith divers sums of money amounting in the whole to a large sum of money exceeding the said debt or sum of 45*l*., and which said sums of money had since continually remained and still were due and unpaid from him the plaintiff to the said F. R. Smith; and that this action was brought and was prosecuted by and in the name of the plaintiff as a trustee for, and for the sole use and benefit of, the said F. R. Smith, and to recover the said debt or sum of 45*l*. for the sole benefit of the said F. R. Smith, who was alone beneficially interested and entitled thereto, and not in any manner for the use or benefit of him the plaintiff.

To this replication the plaintiff demurred, the ground of demurrer stated in the margin being, "that the assignment of the said debt to Smith did not deprive the defendant of his right to set off a debt due from the plaintiff upon the record." Joinder.

*H. Lloyd* (with whom was *Lush*, Q. C.), in support of the demurrer.—A Court of law does not take notice of such equitable rights as that set up by this replication. In *Wake v. Tinkler*, 16 East 36, it was held that a defendant cannot plead by way of set-off a bond-debt of the plaintiff, assigned to defendant by another, to whom and for whose use it was originally given. It was there contended, in support of the plea, that it did not follow that because the assignee could not sue for it at law, he could not set it off. But Bayley, J., said: "We have nothing to do in this place with any other than legal rights." [*BYLES*, J.—If the defendant had been assignee of the judgment, and the plea had been pleaded as an equitable plea, it might have done possibly.] Possibly it might. In

\**Tucker v. Tucker*, 4 B. & Ad. 745 (E. C. L. R. vol. 24), S. gave a bond conditioned for the payment of money. The obligee made C. his executrix and residuary legatee, and died. C. proved the will, assented to the bequest, and died, not having fully administered, leaving E. executrix of the executrix C., in trust for her (E.'s) own benefit. A sum due on the bond in the first testator's time remained unpaid. C., during her lifetime, in consideration of a marriage about to take place between her and the father of S., gave a bond to a trustee, conditioned for payment of a sum of money to the use of S. if C. should marry and survive her intended husband. She did marry and survive him, and, the money not having been paid in her lifetime, the trustee's executor sued E., the executrix of C., upon that bond. And it was held, that, in this action, the claim of C. upon S.'s bond could not be set off. Two MS. cases, *Bottomley v. Brook*, cited 1 T. R. 621, and *Rudge v. Birch*, cited 1 T. R. 622, were relied on in support of the set-off. But *Littledale, J.*, said: "I think *Bottomley v. Brook* was not properly decided, and that, under the statutes of set-off, the Court can only notice an interest at law." [KEATING, J., referred to *Isberg v. Bowden*, 8 Exch. 852.† There, to an action for freight due upon a charter-party, the defendant pleaded, that the plaintiff entered into the charter-party as the master of the vessel, and for and on behalf and as agent for the owner; that the plaintiff never had any beneficial interest in the charter-party, nor had he any lien whatever on the freight; and that he brought the action solely as agent and trustee for the owner. The plea then proceeded to state that the owner was indebted in a certain sum to the defendant, which he thereby offered to set off against the plaintiff's demand. And it was held that such debt was not "a mutual debt between the plaintiff and the \*defendant," within the true meaning of the statutes of set-off, [282 2 G. 2, c. 22, s. 13, and 8 G. 2, c. 24, and therefore that the plea was bad: and that the statutes of set-off are confined to legal debts between the parties, their sole object being to prevent cross-actions between the same parties.]

*Collier, Q. C.* (with whom was *Hance*), contra.—The assignment of the debt,—which is perfectly lawful, though the assignee cannot sue for it in his own name,—deprives the defendant of his right to set off the judgment against the plaintiff on the record: and the replication, which alleges that the plaintiff is suing as trustee for Smith, and that the defendant had notice of the assignment before the judgment was obtained, is a perfectly good replication. [BYLES, J.—At law, nothing passes by the assignment of a chose in action.] One may sue as trustee for another; and such a right would not pass to his assignees, in the event of bankruptcy: *Houghton v. Koenig*, 18 C. B. 235 (E. C. L. R. vol. 86). [BYLES, J.—The bankrupt law deals with beneficial interests only.] The question is, whether a set-off against the nominal plaintiff can be pleaded against the real plaintiff. At the time this action was commenced, the debt sued for was the property of Smith. [ERLE, C. J.—*Isberg v. Bowden*, 8 Exch. 852,† is expressly against you] That case scarcely raises the question presented here.

ERLE, C. J.—I am of opinion that the cases cited by Mr. *Lloyd*, of *Wake v. Tinkler*, 16 East 86, and *Tucker v. Tucker*, 4 B. & Ad. 745 (E. C. L. R. vol. 24), coupled with the case to which my Brother

Keating referred of *Isberg v. Bowden*, show that this is a bad replication. The plaintiff sues for a debt; the defendant pleads a set-off in respect of a judgment obtained by him against the plaintiff; and the \*283] plaintiff replies, that, before the \*judgment was recovered, he had assigned to one Smith the debt due to him from the defendant, and that the defendant had notice thereof. The cases adverted to distinctly negative this transposition of the legal rights of parties so as to defeat a set-off by reason of some equitable right in a third party. The replication is clearly bad.

WILLES, J.—I am of the same opinion.

BYLES, J.—I think it is quite shocking that the point should be raised again after the statute and the cases which have been decided upon it.

KEATING, J., concurred.

Judgment for the defendant.

WILLIAM FARRAND, Appellant; (a) GEORGE COOPER,  
Respondent. *April 25.*

Steam-vessels plying between the river Itchen, at Southampton, and the Isle of Wight, are bound, under the Southampton Pier Act, 1 & 2 W. 4, c. 1. s. 56, to call at the Royal Pier at Southampton when requested by five passengers to do so.

THIS was a case stated by justices under the 19 & 20 Vict. c. 43, to take the opinion of the Court as to whether or not steam-vessels going from a landing-place in the river Itchen, at Southampton, to Cowes, in the Isle of Wight, were, under the provisions of the Southampton Pier Act (50 G. 3, c. clxviii.), s. 56, bound to call at the Town Pier for the embarkation of passengers.

\*284] \*By the 43 G. 3, c. xxi., intituled "An Act for abolishing certain dues called petty customs, anchorage, and groundage, and for improving the port of the town of Southampton, for making a convenient dock for the security of ships, for extending the quays and wharfs, and making docks and piers in the harbour there, and for erecting warehouses for the safe custody of goods and merchandise, and for imposing certain duties for the above purposes,"—reciting that the port of the town of Southampton was of great antiquity, and was capable of being rendered more commodious than at present for carrying on trade, both foreign and coastwise, by the construction of a basin and wet docks and piers, and by the improvement of the then present quays and wharfs for the reception of and harbouring ships and vessels, and by erecting warehouses for the safe custody of goods and merchandise, whereby the said port and town of Southampton would be greatly benefited, and the navigation and commerce of the kingdom increased; and reciting that the mayor, bailiffs, and burgesses of the town and county of the town of Southampton had by virtue of several charters granted to

(a) The appellant was clerk to the commissioners for putting into execution an Act of William the Fourth, intituled "An Act for erecting and maintaining a pier and other works for the more conveniently landing and embarking passengers in the port of the town of Southampton," 1 & 2 W. 4, c. 1.

them by His Majesty's progenitors, kings and queens of England, received and been entitled or claimed to be entitled to receive duties called petty customs upon the exportation and importation of all goods and merchandise out of and into the said port of Southampton, from the owner, exporter, or importer of such goods and merchandise, and also certain other duties called anchorage and groundage, payable by all vessels coming within and not belonging to the said port, together with wharfage and craneage, from the owners and masters of all such vessels, which said rights, privileges, immunities, exemptions, and advantages, the said mayor, bailiffs, and burgesses were willing to relinquish and give up upon a compensation \*being made for the loss and diminution that would accrue to [\*285 the said mayor, bailiffs, and burgesses by abolishing the same:

But, forasmuch as a very considerable expense would be incurred by the making the said basin and docks and piers, and erecting the said warehouses, and preserving and maintaining the same when made, as well as the present quays; and it was reasonable that the sums necessary to defray the same should be paid by persons trading from and to the said port of the said town of Southampton; and as the danger ships are now exposed to for want of such advantages would be thereby in a great measure removed,—it was enacted that the mayor, recorder, and common councilmen of the said town and county of Southampton and their successors in respect of such their offices together with certain persons named and their successors, to be elected, nominated, and appointed in manner thereafter mentioned, should be and they were thereby appointed commissioners for putting the Act into execution, and should have and they had by that Act full power and authority to make a wet dock or basin with wharfs and sluices, and to erect a pier or piers, dock or docks, warehouse or warehouses, of such materials and in such manner as they should see fit, and to extend, alter, and repair the then present quays and wharfs, and erect warehouses and other works necessary for the improvement of the said harbour and port (and then and from thenceforth such of the quays and wharfs then made or built or repaired by the said Commissioners should be deemed and taken to be legal quays and wharfs accordingly), and also for the safe custody of goods and merchandise, and for the more convenient use of the same within the said port of the town and county of the town of Southampton, and should for that purpose have power and authority to purchase lands, tenements, and hereditaments for the \*use of the said piers, docks, basins, and [\*286 wharfs, without incurring any of the penalties or forfeitures of the statute of Mortmain, and at any time or times to sell, dispose of, and convey any such lands, tenements, or hereditaments which should not be wanted for the purposes of the Act to any person or persons whomsoever; and the said Commissioners should have power and authority to place booms for marking the channel in the Southampton Water, from Calshot Castle up to the town of Southampton, and also up to Redbridge and Eling in the Southampton River, and up to Northam in the river Itchen; and that all acts, matters, and things thereby authorized or directed to be done by the said Commissioners might be done or executed by any five or more of them, and should

be as valid and effectual as if done and executed by all the said Commissioners, unless otherwise thereafter particularly directed.

The 5th section enacted that the Commissioners should make by-laws. This was repealed by the 50 G. 3, c. clxviii, s. 11.

The 6th section enacted that no by-law to be made under the authority of the Act should in any way extend or be construed to extend to any ship or vessel so as to subject the owner or the master or other person having the command or charge thereof to any control or expense (except so far as should be necessary for the recovery of the boomage duties thereby granted) either at Chappel, Northam, Redbridge, Eling, or in the Hamble Water.

The 9th section enacted that the messuages, lands, tenements, and hereditaments to be purchased by virtue of the Act, and all buildings, erections, and other matters and things thereon and thereunto belonging, and also all basins or docks, cuts, quays, wharfs, works, ware-  
\*287] houses, buildings, and requisite \*roads, ways, sluices, drains, matters, and things which should be made, built, provided, or established by virtue or in pursuance of the Act, should be and the same were thereby vested in the said Commissioners; and they and their successors were thereby authorized and empowered to bring any action or actions and to prefer bills of indictment against any person or persons who should cut, damage, or injure, or cause to be cut, damaged, or injured, any of the works to be made, erected, established, amended, or repaired by virtue of that Act, or who should injure or destroy the same whilst doing, or impede the doing thereof, or should steal, purloin, or wrongfully take away stone, lead, iron, wood, bricks, or other materials and machines, engines, or utensils provided or to be provided from time to time, or used or intended to be used therein, or for any other purposes of the Act, or who should wilfully do or suffer or consent to anything whereby damage might accrue to the messuages, erections, and buildings to be purchased, or the works or machines to be made or erected, by virtue of the Act; and all the damages which should be so recovered by the said Commissioners by any suit, process, or action, after deducting the costs of suit, should be applied as thereafter directed.

By section 13, the petty customs were to cease, and new rates, &c., to be raised: but this was repealed by s. 13 of the 50 G. 3, c. clxviii, and new rates granted.

By s. 15, it was enacted that nothing therein contained should extend or be construed to extend to charge with the said rates, dues, or duties, or any of them (except the boomage duties), any ship or vessel on account of her coming to or anchoring at Chappel, Northam, Redbridge, Eling, or Woodmill, except as to so much of the cargo of such ship or vessel as should be landed or shipped at or from the said  
\*288] pier, dock, or \*basin, or any legal quays at the said town of Southampton.

By section 16, no boomage duty was payable until booms were laid down.

Section 19 provided for the application of the moneys arising by the duties.

By section 21, tonnage was to be paid according to the certificate of registry.

By section 23, the rates were to be paid before vessels were entered at the custom-house.

By section 35, it was enacted that all vessels, hoys, boats, barges, lighters, or other craft coming within Calshot Castle, and navigating in the water called Southampton Water, and the rivers thereto belonging, as far as the tide flows therein, should, as to the payment of boomage dues, be deemed to be within the harbour of the said town of Southampton, in such and the same manner as if they had come to and used the pier, dock, or basin, and should be subject and were thereby declared to be liable to the same boomage, and the rules, by-laws, regulations, and payments on account thereof, as all other ships and vessels coming into the said pier, dock, or basin.

By section 37, provision was made for the appointment of a harbour-master and dock-master.

By section 52, it was enacted that nothing in the Act contained should extend or be construed to extend to affect, prejudice, alter, abridge, or take away any rights, estates, powers, immunities, and advantages or privileges whatsoever belonging or appertaining to the mayor and corporation of the said town and county, or to any other person or persons whomsoever (except such as were thereby expressly taken away or altered); but that all such rights, estates, powers, and privileges should continue in full force and effect, and might be exercised and enjoyed in as full and ample a manner \*to all intents [\*289 and purposes as if the Act had not been made, anything therein contained to the contrary notwithstanding.

Section 53 provided for the recovery and application of penalties.

The following is an extract from the schedule to the Act, of the rates, dues, and duties to be paid:—

“A tonnage duty on all British ships loading or unloading at the quays or in the road, 2*d*. per ton each voyage: Foreign ships double.

“Colliers, coasters, and short traders allowed to compound at 1*s*. per ton per annum.

“Boomage duty, in lieu of harbour dues and of anchorage and groundage, to be paid by all ships coming within Calshot Castle, and not belonging to the port, videlicet:—

	£	s.	d.
“Under 50 tons . . . . .	0	1	6
“Above 50 and under 100 . . . . .	0	2	6
“Above 100 : . . . .	0	5	0

“Foreign ships double.”

By an Act of Parliament made and passed in the 50th year of the reign of King George the 3*d*, intituled “An Act for altering and amending an Act made in the 43*d* year of his then present Majesty’s reign for improving the port of the town of Southampton” (50 G. 3, c. clxviii.),—reciting that an Act was passed in the 43*d* year of the reign of His then present Majesty, intituled, &c., and that great progress had been made in the execution of the works authorized by the said Act, and the improvements of the said port and harbour of Southampton were in a state of great forwardness; and the powers and provisions of the said Act had been found defective and insufficient for the purposes thereby intended; and that it was therefore expedient that the same should be altered, amended, and enlarged, and that the

\*290] rates and duties \*thereby granted and imposed should be better regulated, and in some instances increased; and that doubts and disputes had arisen upon the intent and meaning of the said Act respecting the choice and appointment of persons in the room of the Commissioners specifically named therein, which required to be removed and explained; and that it had been found necessary that the powers of the said Act authorizing such choice and appointment should be altered and amended; but that, inasmuch as the said several objects could not be obtained or carried into effect without the aid and authority of Parliament,—it was enacted that the said recited Act and all and every the clauses, powers, penalties, forfeitures, rates, remedies, payments, provisions, articles, matters, and things whatsoever therein contained (save and except such parts as were thereby varied, altered, or repealed), should be as good, valid, and effectual for carrying that Act into execution, as if the same had been repeated in the body of this present Act.

By ss. 8 and 4, the former appointment of Commissioners was repealed, and new Commissioners appointed.

The 12th section enacted that it should and might be lawful to and for the said Commissioners, or any nine or more of them, at any of their meetings, to make such by-laws, orders, and regulations for the ordering, securing, and safely and conveniently stationing or placing of the ships, vessels, and small craft coming into and laying in the said harbour and port, dock or docks, basin or basins, or alongside or at any quay or quays, and for loading, unloading, mooring, or unmooring thereof, and for the safety and preservation of the goods and merchandise landing or shipping there, and of the works to be made or done in pursuance of or by virtue of that Act or of the recited Act, and for the appointment, regulation, direction, and \*291] \*good conducting of ships, vessels, and small craft into or out of, or whilst within, the said harbour or port, dock or docks, basin or basins, or at the quay or quays, and for regulating the placing or stowing of ballast on the said quay or quays, or in the said harbour or port, and the use of fires, and the meeting of combustible matters on board of any ship or vessel or craft, and for regulating, or licensing, and registering all vessels, boats, wherries, lighters, and other small craft, wagons, carts, drays, and other carriages kept and used for hire at the said port of the town of Southampton, or on the said quays or wharves, or usually plying or coming thereto, and also all boatmen, wagoners, drivers, barrowmen, porters, and other persons employed thereon by or under the license or authority of the said Commissioners, and also to dismiss and discharge such boatmen, barrowmen, porters, or persons for misconduct or misbehaviour, and also to fix, regulate, and ascertain the rates and fares to be taken by such boatmen, barrowmen, porters, or other persons plying on or to or from the said piers, wharves, and quays, and also for removing and preventing nuisances within the limits of the said harbour or port, as should from time to time appear necessary and proper, and to alter, vary, or repeal the same as occasion should require, so as such by-laws, rules, orders, and regulations be not repugnant to the laws of England or the provisions of the recited Act or that Act; and to impose reasonable fines and penalties for the breach and non-observ-

ance of such by-laws, rules, orders, and regulations, and on any person or persons plying without license, so as no one penalty should exceed the sum of 10*l.*; which fines and penalties should be recovered and levied as any fines, penalties, and forfeitures by the said Act inflicted or imposed were thereby directed to be recovered and \*levied; [\*292 and that all such by-laws, rules, orders, and regulations, rates, and fares, and the fines and penalties for the breach and non-performance thereof, should from time to time, as often as they should be made, altered, or varied, be put up either in print or in writing in a clear legible hand in the custom-house of the said port, and in such other place and places as the said Commissioners might appoint, and at all times remain and be in the said places, and upon application, a copy thereof should be delivered to any person requiring the same, on payment to the harbour-master of 1*s.* for the same: Provided always that such by-laws, rules, orders, and regulations should be subject to appeal, in like manner as appeals were authorized and given in and by the recited Act.

By s. 13, the rates imposed by the recited Act were repealed; and by s. 14, it was enacted, that, from and after, &c., there should be paid unto the said Commissioners, as well by the persons being respectively of the said corporation of the town and county of Southampton, and the owners and masters having the command of ships, vessels, or small craft belonging to the said port of Southampton, as by all and every other persons or person whomsoever, for all goods, wares, merchandise, and commodities whatsoever exported from or imported into the said port of Southampton, and which should be landed in or shipped from the dock or docks, wharf or wharves, basin or basins, to be constructed under the recited Act or that Act, or at any other legal quays in the said town of Southampton, and for warehousing the same, and for all ships and vessels coming into the pier or piers, dock or docks, basin or basins, to be constructed as aforesaid, or the road for ships there, the several rates and duties mentioned, specified, enumerated, and imposed in and by the table thereunto annexed.

\*By s. 15, the Commissioners were to settle rates on commodities not enumerated in the table. [\*293

By s. 28, the quays were vested in the Commissioners.

The 31st section enacted that so much of the recited Act as related to the empowering the Commissioners to compel the sale to them of any lands, tenements, or hereditaments which the Commissioners should think necessary to purchase for the purposes of that Act or the recited Act, and so much thereof as authorized the recompense and satisfaction to be made to the owners or proprietors, tenants or occupiers, or other person or persons interested in such lands, tenements, or hereditaments, for the taking the same, to be ascertained by a jury in cases of neglect or refusal to treat, or non-agreement thereon, or absence from treating, should not extend or be construed to extend to any other lands, tenements, or hereditaments, than the lands, tenements, or hereditaments, situate and lying westward of the Watergate Quay, along the shore, unto the place where an ancient turret in the town-wall formerly stood, late belonging to James Parker, blacksmith, at the end of Bugle Street, parallel with the new Breakwater, and not further inwards from the same line of shore than fifty yards.

The 40th section enacted that nothing in that Act contained should extend or be construed to extend to affect, prejudice, alter, abridge, or take away any rights, estates, powers, immunities, and advantages or privileges whatsoever belonging or appertaining to the mayor and corporation of the said town and county, or to any other person or persons whomsoever (except such as were thereby expressly taken away or altered), but that all such rights, estates, powers, and privileges should continue in force and effect, and might be exercised and enjoyed in as full and ample a manner, to all intents and purposes, as \*294] if that Act had not been made, \*anything therein contained to the contrary notwithstanding.

Extract from the table of the rates, dues, and duties referred to by the Act:—

"A tonnage duty on all British ships loading or unloading at the quays or in the road, 2*d*. per ton each voyage: Foreign ships, double.

"Colliers, coasters, and short traders allowed to compound at 1*s*. per ton per annum.

"Boomage duty, in lieu of harbour dues and of anchorage and groundage, to be paid by all ships coming within Calshot Castle, and not belonging to the port, videlicet:—

	£	s.	d.
"Under 50 tons . . . . .	0	1	6
"Above 50, and under 100 . . . . .	0	2	6
"Above 100 . . . . .	0	5	0

"Foreign ships, double."

By an Act of Parliament made and passed in the 2 W. 4 (sess. 1831), intituled "An Act for erecting and maintaining a pier and other works for the more conveniently landing and embarking passengers in the port of the town of Southampton,"—reciting the 43 G. 3, c. xxi., and 50 G. 3, c. clxviii.; and that the quay of the said port of Southampton had been much enlarged, and the avenues thereto much widened, and the port generally improved, but that, the said port of Southampton being a place of great public resort for persons passing and repassing to and from the Isle of Wight, the islands of Guernsey and Jersey, and to and from France, particularly by steamboats or vessels, it would tend much to the convenience and safety of passengers embarking and landing at the said port, and to the accommodation of trading vessels, if a separate and more convenient landing-place were made for passengers and their luggage, to prevent any necessity for passengers being conveyed by boats to and from \*295] such steamboats or vessels from and to the shore, and being detained on board the vessels as they then were by reason of the obstruction of the mud, and otherwise would be of great public utility,—it was enacted that the persons who by virtue of the first recited Act, as amended by the secondly thereinbefore in part recited Act, should for the time being be Commissioners for putting the said two thereinbefore recited Acts into execution, and their successors, should be, and the same persons and their successors were thereby, appointed Commissioners for the purpose of putting that Act into execution.

The 14th section enacted, that, as soon as conveniently might be after the passing of that Act, it should be lawful for the said Commissioners, and they were thereby authorized and required, to erect and

build, or cause to be erected and built, a new pier or landing-place at the present breakwater of the said town of Southampton, so that vessels might be able to float alongside such pier at low water, such pier to communicate with the west end of the then Watergate Quay at or near the bottom of Bugle Street, in the said town and county of Southampton, and to be built of stone, iron, wood, or such other materials as the Commissioners should think best, and to excavate the soil or mud at any parts near thereto, and to make proper approaches thereto, and also to erect thereon and put up cranes, crane-houses, steps, toll gates, toll-houses, railings, and such other erections and conveniences as the Commissioners should think proper, for the facilitating the landing or shipping of horses, carriages, luggage, and other goods, and for taking the tolls thereafter allowed to be taken, and to remove and alter all such cranes, crane-houses, steps, railings, and other conveniences as to the Commissioners should seem most beneficial, and to alter the situation of the said \*toll-gates and toll-houses as to the Commissioners should seem expedient, and to [\*296 keep in repair, replace, or remove the said pier, cranes, crane-houses, steps, toll-gates, toll-houses, railings, and other erections and conveniences, as to the Commissioners should seem requisite, and to sell and dispose of any toll-house or toll-houses, gate or gates, cranes, crane-houses, railings, and conveniences to be erected by virtue of that Act, when they should be by the Commissioners considered unnecessary for the purposes of that Act, the moneys to be produced by any such sale to be applied as is therein directed respecting the moneys to be raised by virtue of that Act: Provided always, that no erection (excepting cranes and other engines, and a building for the shelter of passengers and their luggage), exceeding in height twelve feet from the level of high-water mark should be made, authorized, or permitted upon the said pier, or any part thereof, beyond the entrance-gate or gates from the street: Provided also, that the northern part or side of the said pier above or beyond twenty feet of the low-water mark should not at any time be made or become a common mooring-place or harbourage for vessels frequenting the said pier, nor for the deposit of soil or ballast.

The 24th section enacted that the several tolls or dues mentioned and enumerated in the schedule to that Act, or such tolls or dues not exceeding the said several tolls or dues as the Commissioners or any nine or more of them assembled at any meeting or meetings to be held in pursuance of that Act, should from time to time appoint, should be demanded and taken at the toll-gate or toll-gates of the said pier, by such person or persons as the Commissioners should from time to time appoint, before any person, beast, pig, sheep, calf, carriage, goods, wares, or other merchandise in the schedule mentioned or comprised, should be allowed \*to go or be landed on, or to go or be removed from, [\*297 the said pier, as the case might require.

The 37th section empowered the Commissioners to raise money on mortgage of tolls, and gave a form of mortgage: and the 51st section provided that the Commissioners should not erect another pier until the debt was satisfied.

The 56th section enacted that all captains, masters, or persons in command of steamboats carrying passengers should *immediately* on

*their arrival in the said port of Southampton, if required so to do by any five passengers, and provided there be sufficient accommodation for such steamboat or other vessel, and the wind and weather would permit, come alongside the said intended pier for a sufficient time to enable passengers and their luggage to land thereat; and also should (if carrying or being ready or willing to carry passengers), immediately before their departure from the said port of Southampton, provided there be sufficient accommodation for such steamboat or other vessel, and if wind and weather would permit, come alongside the said intended new pier, for the purpose of enabling passengers, together with their luggage, to embark from the said intended pier: and, in case of any captain, master, or person in command of any steamboat or other vessel carrying passengers, or being ready or willing to carry passengers, refusing or neglecting to obey and follow that enactment, he or they for every such refusal or neglect should forfeit and pay to the said Commissioners any sum not exceeding 5l.*

The 65th section enacted, that all penalties and forfeitures imposed by that Act, or by any rule, order, or by-law made in pursuance thereof (the manner of levying and recovering whereof was not therein otherwise particularly directed), might, in case of non-payment thereof, \*298] be recovered in a summary way, by the \*order and adjudication of some one or more justice or justices of the peace for the town and county of Southampton, on complaint to him or them for that purpose made upon the oath or affirmation of any person or persons, or on the confession of the party offending (which oath or affirmation such justice or justices was or were thereby authorized to administer), to be paid within such time as the said justices should direct; and in default of payment of such penalties or forfeitures according to such order or judgment, and if the party or parties offending should not in the mean time have compounded with the said Commissioners (which composition the said Commissioners were thereby empowered to enter into, provided the penalties or any part thereof were payable to the said Commissioners), the same should be levied by distress and sale of the offender's goods and chattels, by warrant under the hand and seal or hands and seals of such justice or justices, rendering the overplus (if any), on demand, to the party or parties whose goods and chattels should be so distrained (the reasonable charge of such distress and sale being first deducted); and one moiety of the penalties and forfeitures when recovered should be paid to the informer, and the other moiety thereof should be paid to the treasurer of the said Commissioners, for the use and benefit of the Commissioners, unless such penalties or forfeitures should be incurred by the said Commissioners, in which case the same should be paid one moiety to the informer, and the other moiety to be applied by such justice or justices as to him or them should seem fit; and, in case such penalties and forfeitures should not be paid as aforesaid, it should be lawful for such justice or justices, and he or they was or were thereby authorized and required, to order the offender or offenders so convicted to be \*299] kept in safe custody until the return could conveniently \*be made to such warrant of distress, unless the offender or offenders should give sufficient security, to the satisfaction of such justice or justices, for his, her, or their appearance before him or them, or

before some other justice or justices of the peace for the said town and county, on such day or days as should be appointed for the return of such warrant of distress (such day not to be more than seven days from the taking of any such security), and which security the said justice or justices was or were thereby empowered to take by way of recognisance or otherwise: but, if, upon the return of such warrant, it should appear that no sufficient distress could be had whereupon to levy the said penalty or penalties and such costs as aforesaid, and the same should not be forthwith paid, or in case it should appear to the satisfaction of the said justice or justices, upon the confession of the offender or otherwise, that he or she had not sufficient goods and chattels whereupon such penalties or forfeitures, costs, and expenses could be levied if a warrant of distress should be issued, such justice or justices should not be required to issue such warrant of distress; and thereupon it should be lawful for such justice or justices, and he or they was or were thereby authorized and required, by warrant under his hand and seal, or their hands and seals, to commit such offender or offenders to the common gaol or house of correction for the said town and county, there to remain for any time not exceeding six calendar months, or until such penalty or forfeitures shall be sooner paid and satisfied, together with all costs and charges attending such proceedings as aforesaid, to be ascertained by such justice or justices, or until such offender should otherwise be discharged by due course of law.

Extract from the schedule to which the foregoing Act refers,—

\*“ For every passenger and other person who should land on the same pier or landing-place, or embark or go on board any vessel, boat, wherry, or other machine from the said pier or landing-place, or any part thereof, for each and every time, 2d.” [\*300]

By the 121st section of the 6 W. 4, c. xxix., intituled “ An Act for making and maintaining a dock or docks at Southampton,”—after reciting the Acts hereinbefore recited,—it was enacted “ that all and every the docks, locks basins, cuts, outlets, and inlets, which should be made under the authority of that Act should be deemed and held to be situate *within and part of the port of the town of Southampton*, and within the parish of Saint Mary, in the said town; and that the rights and privileges which belong to the port of the town of Southampton should extend to the said docks, locks, basins, cuts, outlets, and inlets, and all ships and vessels entering into or loading or unloading in the said docks, locks, basins, cuts, outlets, and inlets, or any of them; and that all owners and masters of ships, merchants, and others resorting thereto, should be subject to the several regulations and liable to the duties of tonnage and boomage and other duties to which they were subject or liable in the port of the town of Southampton, as if the said ships and vessels had loaded or unloaded at the public quays of the Commissioners acting in execution of the recited Acts of the 43 G. 3, c. xxi., and 50 G. 3, c. clxviii.

By s. 122, it was enacted that all goods, merchandise, and things whatever which should be landed or shipped upon or from the quays or wharves which should be built under the authority of that Act, or any of them, should be subject and liable to the same tolls, duties, dues, and customs, and to the like regulations respectively, as if the

\*301] same were landed upon or shipped from the present legal \*quays within the port of the town of Southampton, or as if the same intended quays or wharves were situated within the said port, except as hereinafter was otherwise provided.

By section 123, all materials for the construction of the docks were exempted from the rates imposed by the 43 G. 3, c. xxi., and 50 G. 3, c. clxviii., unless the said materials, matters, and things should be landed at the quays and wharves belonging to the said Commissioners, and that, from and after the opening of the said dock or docks for the reception of ships and goods, all goods, wares, and merchandise, and other commodities whatsoever which should be landed at or in or shipped from the dock or docks, wharf or wharves, quay or quays, or other works and conveniences thereby authorized to be made and constructed, or any part thereof, should be exempt from the several rates, duties, and payments which otherwise might be demanded, taken, collected, or received under or by virtue of the said recited Acts on such goods, wares, merchandise, and other commodities.

Section 182 saved the rights of the Crown and the corporation of Southampton.

In pursuance of the said recited Act, a pier was duly built, and money has been borrowed thereon on mortgage of the tolls, to the amount of 14,400*l.*, which still remains owing.

On the 2d of December instant, an information was laid against the respondent, under the 56th section of the 1 & 2 W. 4, c. i., as follows:—

“Town and County } Be it remembered, that, on the 2d of  
of the Town of South- } December, 1861, William Farrand, of the  
ampton, to wit. } town and county of the town of Southamp-

\*302] \*Parliament hereinafter mentioned, informeth me, Joseph Bernard, Esq., one of Her Majesty's justices of the peace in and for the town and county of the town of Southampton, upon the complaint of the said William Farrand, that, heretofore, to wit, on the 1st of November, 1861, after the passing of an Act of Parliament passed in the second year of the reign of His late Majesty King William the Fourth, intituled ‘An Act for erecting and maintaining a pier and other works for the more conveniently landing and embarking passengers in the port of the town of Southampton, and after the new pier and works by that Act authorized and required to be erected and built had been duly erected and built at the breakwater of the town of Southampton in that Act mentioned, pursuant to the provisions thereof, one George Cooper, then being the master in command of The Lady of the Lake, a steamboat then carrying passengers, did not nor would immediately on his arrival, on the day and year last aforesaid, in the port of Southampton in that Act mentioned, although then duly required so to do by five persons then being passengers in that steamboat, that is to say, by one B. A., &c., &c., and although there was at the time on the day and year aforesaid, when the said steamboat arrived and was in the said port, with the said George Cooper in command thereof as such master as aforesaid, sufficient accommodation at and alongside the said new pier for such steamboat, and although the wind and weather would have permitted and did then

permit, come alongside the said new pier for a sufficient time to enable the said passengers and their luggage to land thereat; but the said George Cooper, so then being such master in command of the said steamboat carrying passengers as aforesaid, then wrongfully neglected so to do, and then so neglected to obey and follow the enactment in the \*said Act in that behalf, contrary to the form [\*303 of the statute in such case made and provided."

On the hearing of the case, on the 11th of December instant, it was proved before the justices, by Benjamin Ambler, that he is a toll-contractor, and lessee of the tolls of the aforesaid pier; that he was a passenger by the Lady of the Lake steamboat on Friday afternoon, the 1st of November last, from Cowes to Southampton, and that George Cooper, the respondent, was in command; that he was desirous of being landed at the Royal Pier, as it would have been more convenient to him; that there were about fourteen passengers on board that day, the parties named in the information being among the number; that, when he was within Calshot Castle, he paid the collector the fare, and afterwards went to the captain and asked him if he was going to the Royal Pier, who said he could not tell him; that he then said he wanted to be landed at the Royal Pier, after which he served a written notice upon the captain, which was produced, and which is in the words following:—

"To George Cooper, captain, master, or person in command of the Lady of the Lake steam-packet.

"We, the undersigned, being five of the passengers now on board the above vessel, require you immediately on your arrival at the port of Southampton to land us at the Royal Pier, in compliance with the 56th section of the Act of Parliament 1st and 2d William the 4th, cap. i., intituled 'An Act for erecting and maintaining a pier and other works for the more conveniently landing and embarking passengers in the port of the town of Southampton.' Dated," &c. Signed by the persons named.

Ambler further stated that he signed it and saw the others sign it; that he delivered it to the captain; that, at the time he delivered the notice, the vessel \*was between Calshot and Netley; that the respondent did not take the steamboat round to the Royal Pier, [\*304 but went to Itchen Ferry, to the landing-place there near to the floating bridge; that, when he delivered the notice, the captain said he would let witness know when he got to Itchen Ferry; that he read the notice when he gave it to the captain; that, at the landing-place, the captain went ashore and came back with Mr. Bridger and Mr. Alexander; that the captain did not take the passengers to the Royal Pier; that the weather was very fine at the time, and would not have prevented the respondent going to the pier; and that there was accommodation at the pier at the time.

Gilbert Strangeway Biggs proved, that he lives at Bevois Hill; that, on the 1st of November last, he was a passenger by the Lady of the Lake from Cowes to Southampton; that, he wrote the notice, and saw it signed and served.

At this point of the proceedings, extracts from the charter of the town of Southampton, and also extracts from a certain commission

issued from the Exchequer, and certificate made thereon, touching the port of Southampton and its members, were read.

The following are copies of such extracts from the charter and commission:—

Extract from the charter of the county of the town of Southampton,—Charles I.

“And moreover, of our further special grace, and of our certain knowledge, and mere motion, we do, for us, our heirs and successors, give, grant, and confirm, that the aforesaid mayor, bailiffs, and burgesses, and their successors, may have the aforesaid town of Southampton at farm for ever, with the port of Portsmouth, with all their appurtenances, liberties, and free customs, and all other things which \*305] to the farm of the \*said town of Southampton belong, or at any time heretofore did belong, To have and to hold the town aforesaid to the said mayor, bailiffs, and burgesses, and their successors, in fee-farm, with all the liberties, franchises, jurisdictions, revenues, services, and appurtenances whatsoever, for ever, yielding therefore yearly unto us, our heirs and successors, at the Feast of St. Michael the Archangel, at the receipt of our Exchequer, 200*l*. when the petty customs shall any year there amount to the sum of 200*l*., or when any ships called the carricks of Jene (Genoia), or when any ships called gallies of Venice, shall come to the town of the port aforesaid with their merchandises in any year, and there shall unload and ship or reload; and yielding therefore unto us, our heirs and successors, at the said Feast of St. Michael the Archangel, at the said receipt of our Exchequer, 50*l*. only yearly, and no more, when the petty customs in the aforesaid town shall not amount to the said sum of 200*l*., and that the said ships called the carricks and the said ships called gallies of Venice shall not come to the port aforesaid.

“Further we will, and for us, our heirs and successors, by these presents do grant unto the aforesaid mayor, bailiffs, and burgesses, and to their successors, that they may improve and make their profit of all purprestures, as well made on the land as in the water, in and of all wastes within the limits and bounds of the liberty of the town aforesaid, in help and relief, as well in the payment of the fee-farm of the town aforesaid, as in the support of the charges on the same town from time to time incumbent, saving always the right of every one.

“And whereas the Lord Henry the 6th, late King of England, our predecessor, by his letters patent under His Great Seal of England, bearing date at Westminster the 12th day of September, in the 30th \*306] year of his \*reign, amongst other things, for himself, his heirs and successors, did grant unto the then mayor, bailiffs, and burgesses of the town of Southampton, and their successors, and the inhabitants and residents within the said town, for the greater tranquility, quiet, utility, and increase of the town aforesaid, the suburbs, and precincts of the same, that the mayor of the town aforesaid and his successors might do, exercise, and execute all and singular those things which unto the office of Admiralty of England, or in anywise howsoever might belong, within the said town, suburbs, and precincts of the same, without contradiction of the said late King, his heirs or successors, as fully, quietly, and wholly as any Admiral of England had

ever theretofore done, exercised, and executed his office, and all and singular the things belonging to the same office in any manner howsoever; and that the said mayor, sheriff, bailiffs, burgesses, inhabitants, and residents, and their successors, or either of them, should not be compelled by any means to admit or obey any precepts or commands of the Admiral of England or of any his lieutenant or deputy, but should therefore be freed and discharged for ever, so that no Admiral of England or his deputy, nor any other or others in his name, should enter the town, suburbs, and precincts of the same in the presence or absence of the same late King, his heirs or successors, neither by land or by water, to make or hold any session or inquisition, or any pleas there, neither to do, exercise, or execute there any other things concerning his office, of or for any thing, cause, or matter whatsoever, wheresoever, either by land or water, arising as by the same letters patent, amongst other things, is more fully manifest and appears: Now, know ye, that we, willing that the said town aforesaid, and the port of the same, and all the creeks, shores, and maritime places to the same \*belonging, and the navigation and commerce, be continually [\*307 in the same preserved and maintained, and willing that full and speedy justice as well between merchants as others in all things and matters which belong to the cognisance of the Admiralty in our said town be continually done and exercised, of our special grace, and of our certain knowledge and mere motion, have given, granted, and confirmed, and by these presents, for us, our heirs and successors, do give, grant, and confirm to the said mayor, bailiffs, and burgesses of the said town of Southampton, and their successors, for ever, that the mayor, recorder, and four aldermen of the said town, who now are or hereafter for the time being shall be, or any three or more of them for the time being (of whom we will that the mayor or recorder of the said town for the time being shall be one), calling to themselves for their better information when it shall be necessary one other person skilled in the civil law, may at their pleasure hold a Court of Admiralty of all pleas and personal complaints which to the Admiralty belong, as often as there shall be need, in the Guildhall of the same town, or elsewhere within the precincts of the said town, the ports and liberties of the same, and in the same Court may judicially sit and proceed, and may have and exercise power and authority in the same to hear, determine, and execute all and singular actions, debts, contracts, covenants, and other things and personal injuries between any subjects of us, our heirs or successors, or between any others whomsoever, either denizens or aliens, arising or to arise, moving or to be moved, if the parties be found, or their goods, ships, things, or merchandise, within the said town, port, limits, or precincts of the same, be found, taken, or attached, and which to the office of Admiralty belong or may and ought to belong; and that the same pleas and complaints they may bring to \*judgment, and may be able to make and determine execution thereof in as ample and similar [\*308 manner and form as an High Admiral of England or his deputy or Judge of our Supreme Court of Admiralty in England doth hold or hath been accustomed to hold in our Supreme Court of Admiralty, as to the cognisance, trial, prosecution, and determination of the same pleas and personal complaints, or either of them, and by so many and such

processes, judgments, executions, and other things thereof to be done as in our said Court of Admiralty are used and approved; and the said mayor and recorder and four aldermen, or any three or more of them for the time being (of whom we will that the mayor or recorder shall be one), may nominate, constitute, and depute all officers, registrars, notaries, attorneys, scribes, procurators or marshalls, serjeants, and other necessary and fit ministers whomsoever, to prosecute, execute, and determine all and all manner of such actions, pleas, complaints, processes, quarrels, acts, suits, judgments, sentences, executions, and other things whatsoever which in the said Court within the said town shall be necessary to be done in and about the execution of the premises; nevertheless, so that any party aggrieved by any order, sentence, or judgment within the said Court of Admiralty rendered, may appeal for his remedy unto our Supreme Court of Admiralty, to be holden before our High Admiral or his deputy or Judge of the Supreme Court of Admiralty of us, our heirs or successors, and so that it shall and may be lawful for our High Admiral of England or his deputy, or other officers and ministers of the Supreme Court of Admiralty of us, our heirs or successors, for the time being, at all times to enter, do, and exercise within the said town and the limits and precincts of the same, and the port and members of the same, all \*309] and whatsoever to the said office of Admiralty or other \*the service of us, our heirs or successors, shall be convenient or necessary to be done, the said letters patent, or any other letters patent to the same mayor, bailiffs, and burgesses, or their predecessors, heretofore granted, or anything therein contained, in anywise notwithstanding:

"And further we will, and by these presents, for us, our heirs and successors, of our special grace, and of our certain knowledge and mere motion, do grant to the said mayor, bailiffs, and burgesses of the town of Southampton aforesaid, and their successors, that these our letters patent, or an enrolment of the same, and all and singular the things in the same contained, be and shall be from time to time good and sufficient, valid and effectual in the law, towards and against our heirs and successors, as well in all our Courts as elsewhere, according to the true intent of the same, and in and by all things shall be expounded and construed for the greatest benefit, profit, and advantage of the said mayor, bailiffs, and burgesses, and their successors, notwithstanding the not naming, or not certainly or not rightly, or not fully naming the aforesaid premises by these presents granted or confirmed, or intended, &c., or either of them, or any part or parcel thereof, in their proper natures, kinds, sorts, quantities, or qualities, and notwithstanding the not mentioning or not rightly mentioning the length, breadth, and extent of the said town of Southampton, and of the liberties and precincts of the same, or the ports, creeks, shores, or maritime places to the same town belonging, or being within the jurisdiction of the same, and notwithstanding the not reciting or not rightly reciting any charters and letters patent of our ancestors or predecessors, late Kings or Queens of England, to the same mayor, bailiffs, and burgesses or their predecessors, heretofore made or \*310] granted, or the not reciting or the not rightly \*reciting or mentioning any Act of Parliament or statute, or the not mentioning

or particularizing, or the not rightly mentioning or particularizing the true yearly value of the premises, or any of them, or any act, statute, ordinance, restriction, or provision, or any defect, uncertainty, or other imperfection in these our letters patent, or any other cause, matter, or thing whatsoever to the contrary thereof notwithstanding.

"We will also, and by these presents grant to the said mayor, bailiffs, and burgesses of the said town of Southampton, that they have and shall have these our letters patent under the great seal of England in due manner sealed without fine or fee great or small to be thereof yielded, paid, or made, to the use of our heirs or successors, although express mention of the true yearly value of the premises or any of them or of any other gifts or grants by us or by any of our progenitors or predecessors to the mayor, bailiffs, and burgesses of the said town of Southampton heretofore made, be not in these presents contained, or any other statute, ordinance, provision, proclamation, or restriction, or any other thing, cause, or matter to the contrary thereof in anywise notwithstanding. In testimony whereof, we have caused to be made these our letters patent. Witness, ourself at Westminster, the 27th day of June, in the sixteenth year of our reign.

"By writ of privy seal.

"WOOLSEY."

Copy commission issued from the Exchequer, and certificate made thereon. Mich. 32 Car. 2.

"Whereas, in and by an Act of Parliament made in the fourteenth yeare of our Raigne, intituled 'An Act for preventing fraudes and regulating abuses in our customs,'—13 & 14 Car. 2, c. 11, s. 14,—it is, amongst things, recited, that, whereas, in and by an Act of Parliament made in the first year of Queene Elizabeth of \*famous memory [\*311 (1 Eliz. c. 11) directing when and where merchandize shall be landed and customs paid, it is, amongst divers other things, enacted and ordeyned, that noe goodes, wares, or merchandize shall be shipt or laden aboard any shipp or vessell, or landed or discharged out of or from any shipp or vessell, but in or upon such open place, key, or wharfe, places, keys, or wharves (except the port of Hull), as Her Highnesse, Her heires or successors, should therefore assigne or appoint by virtue of Her Highnesse commission or commissions within the port of London and in all ports, creekes, havens, or roades, as in and by the said Act doth and may at large appeare: And, whereas, notwithstanding the said Act, there are some ports, creekes, and places where customers, collectors, and comptrollers and searchers, and their servants, had then time out of mind been resident, to which noe such commissions were sent, nor places, keys, nor wharfes appointed as by the said Act was directed: And whereas also since that time, by reason of the alteration of rivers, streams, channells, and sands, some places then appointed are become unfitt and uselesse, and other places much more convenient and commodious as well as for traffique and commerce as for landing and dischargeing, ladeing and shipping of goods, wares, and merchandizes: And whereas by the said Act made in the foureteenth year of our Raigne, it is, amongst other things, enacted and ordeyned, that we may from time to time by our commission or commissions out of our Court of Exchequer, assigne and appoint all such further places, ports, members, and creekes (excepte the towne of Hull) as shall be lawfull for the landing and dischargeing, ladeing or ship-

ping, of any goodes, wares, or merchandize within our kingdome of England, dominion of Wales, and towne and port of Berwick, and to  
\*312] what \*antient and head ports respectively such places, members, and creekes shall belonge and appertaine; and where any such member, creeke, or place shall be so as aforesaid appointed by virtue of the said commission or commissions, the customer, collector, comptroller, and searcher of the head port shall by themselves or their sufficient deputy or deputys, servant or servants, reside or inhabite, for the entreing, cleereing, and passing shipping, and discharging of shippes, goodes, and merchandize, and by virtue of the aforesaid commission and commissions may likewise sett downe and appoint the extents, limitts, and boundes of every port, haven, or creeke, within our kingdome of England, dominion of Wales, and towne and port of Berwick, whereby the extents, limitts, and priviledges of every port, haven, or creeke may be ascertained and knowne, and that it shall not be lawfull for any person or persons whatsoever to lade or put, or cause to be laden or put, of or from any key, wharfe, or other place on the land, into any shipp, vessel, lighter, boate, or bottome, any goodes, wares, or other merchandize whatsoever (fish taken by our subjects, sea-coale, stone, and bestialls onely excepted), to be transported into any place of the parts beyond the seas, or carryed by land into our realme of Scotland, or to take up, discharge, or lay on land, or cause or procure to be taken up, discharged, and laid on land, out of any boate, lighter, shipp, vessel, or bottome (being not in leeke or wreck), any goods, wares, or merchandizes whatsoever (fish taken by our subjects, bestialls, and salt onely excepted), to be brought from any of the parts beyond the seas, or by land from the realme of Scotland, by way of merchandize, but onely upon such open place, key, or wharfe, places, keyes, or wharfes as wee shall from time to time assigne and appoint by virtue of such commission and commissions as aforesaid, in our port of London and  
\*313] \*the members and libertyes thereof, in any other port, member, or creeke within our kingdom of England, dominion of Wales, and towne and port of Berwick, without speciall sufferance and leave first had from the Commissioners and officers of our customes, upon penalty of forfeiture of all such goodes, wares, and merchandize, as by the same Act, relation being thereunto had, it doth and may, amongst other things therein conteyned, more fully and at large appear: And whereas our said port of Southampton, and the keys and wharfes in our said port of Southampton, and in Portsmouth and Cowes, members of and belonging unto the said port of Southampton, either through the omission of sending such commission or commissions as aforesaid, or els by reason of the alteration of rivers, streames, channells, and sands, through tract of time, are become either in part or in the whole unsettled, unbounded, and unlimited, soe that the extents, limitts, and priviledges thereof are not fully ascertained and knowne, and some of them formerly used are now become unfitt, inconvenient, and uselesse, and other places within the said port and members much more convenient and commodious, as well for tradeing and comerce as for landing and discharging, lading and shipping of goods and merchandize, and for the better securing of our customes, Know yee, therefore, that wee, being very confident

of your fidelity, industry, prudent circumspections, and discretions, have assigned you to bee our Commissioners, and to you the mayor of Southampton now and for the time being, Charles Osborne, &c., or to any three or more of you (whereof the said mayor, Charles Osborne, &c., to be one),—Wee give full power and authority by these presents to repaire to our said port of Southampton, and to search, find out, and survey the open places there and thereabouts, and to assigne and appoint \*all such and soe many open place or places to be places, keyes, or wharfes for the landing or discharging, lade- [\*314 ing or shipping, of any goods, wares, or merchandize within our said port of Southampton, or according to your discretions, or the discretions of any three or more of you (whereof as aforesaid), shall seeme most convenient and fit for the uses and services aforesaid, and to sett downe, appoint, and settle the extents, boundes, and limitts of the said port, and of all such places, keyes, or wharfes, by sufficient meetes, limitts, and boundes, and utterly to prohibit, disanull, make void, determine, and debarre all other places within the said port from the priviledge, right, and benefitt, of a place, key, or wharf, for the landing or discharging, lading or shipping, of any goodes or merchandize as aforesaid (except respectively the goods and merchandize before excepted): And, in like manner, to you the mayor of Portsmouth now and for the time being, Charles Osborne, &c., or to any three or more of you (whereof the said mayor, Charles Osborne, &c., to bee one), we give full power and authority to repaire to Portsmouth, a member of the said port of Southampton, and to search, find out, and survey the open places there and thereabouts, and to assigne and appoint all such and soe many open place or places to be places, keyes, or wharfes, for the landing or discharging, ladeing or shipping of any goods, wares, or merchandize, which the said member, as according to your good discretion, or the discretions of any three or more of you (whereof as aforesaid), shall seeme most convenient and fitt for the uses and services aforesaid, and to sett downe, appoint, and settle the extents, boundes, and limitts of the said member, and of all such places, keys, or wharfes, by sufficient meetes, limitts, and boundes, and utterly to prohibit, disanull, make void, determine, and debarre \*all other places within the said member from the priviledge, [\*315 right, and benefitt of a place, key, or wharfe for the landing and discharging, lading and shipping of any goodes and merchandize as aforesaid (except respectively as is before excepted): And, in like manner, to you Charles Osborne, &c., or to any three or more of you (whereof the said Charles Osborne, &c., to be one), wee give full power and authority to repaire to Cowes, a member of the said port of Southampton, and to search, find out, and survey the open places there and thereabouts, and to assigne and appoint all such and so many open place or places to be places, keys, or wharfes, for the landing or discharging, ladeing or shipping, of any goodes, wares, or merchandize within the said member, as according to your good discretions or the discretions of any three or more of you (whereof as aforesaid), shall seeme most convenient and fitt for the uses and services aforesaid, and to sett downe, appoint, and settle the extents, boundes, and limitts of the said member, and of all such places, keys, or wharfes, by sufficient meetes, limitts, and boundes, and utterly to

prohibit, disanull, make void, determine, and debarre, all other places within the said member from the priviledge, right, and benefitt of a place, key, or wharfe for the landing and discharging, lading and shipping, of any goods and merchandize as aforesaid (except respectively as is before excepted): And therefore wee comand you, that you, or any three or more of you (whereof as aforesaid), in the said port of Southampton, and in each particular member thereof aforementioned, according as you are by these presents thereunto distinctly and severally nominated, appointed, and authorized, doe diligently intend about the premises and all and singular the premises you doe and execute, or any three or more of you (whereof as aforesaid), in \*316] the said port and members thereof \*respectively, doe and execute in forme aforesaid with effect, soe that, when you, or any three or more of you (whereof as aforesaid), in the said port and members thereof respectively have assigned, appointed, nominated, and sett forth any place, key, or wharfe, by meetes, lymitts, boundes, or other descriptions, that then you, or any three or more of you (whereof as aforesaid), for the said port, and each member respectively, do certify your whole doeing in the premises to the barons of the Exchequer at Westminster, so soone as you or any three or more of you (whereof as aforesaid) may, and at the furthest from the day of St. Michael next comeing in three weekes, under your seales or the seales of any three or more of you (whereof as aforesaid), in the said port and each respective member, by whome this our comand is executed, together with these our letters patents, and your several and respective certificates to be had in the premises, to be enrolled in the office of the remembrancer of our said Exchequer, and that thereupon wee may doe what of right and according to the lawes and customes of our realm of England, and tenor of the severall Acts of Parliament aforesaid, is to be done. In witness," &c.

The certificate of the Commissioners is as follows:—

"Wee who names are subscribed, being seaven of the Commissioners in the commission hereunto annexed mentioned for the doeing and executing the severall matters and things in the said commission conteyned, relateing to the port of Southampton in the said commission mentioned, in pursuance of and obedience unto the said commission, doe humbly certify the Right Honorable the barons of His Majesties Court of Exchequer at Westminster, that, by virtue of the said commission to us and others therein named directed, wee did, on the 27th of September, 1680, and at severall dayes and times afterwards and \*317] before the returne of \*the said commission, personally repaire into the said towne and port of Southampton in the said commission mentioned, and did search, view, and survey the open places there and thereabouts; and, by virtue of the said commission, wee do hereby sett down, appoint, and settle the extents, bounds, and limitts of the said port to bee as followeth, viz., *from the neck or point of land commonly called Christ Church Head, within the said county, and from thence south-east in a supposed direct or right lyne to the rocks on the west part of the Isle of Wight, commonly called or knowne by the name of the Needles; and soe continued from the said rocks eastward in a supposed direct line to the west end of the Brambles, and soe to a plice on the main land commonly called Hellhead, and soe back from thence up the streame*

*to the keye of the towne and port of Southampton aforesaid, and soe to Redbridge, together with all bayes, channells, roades, barrs, strands, harbours, havens, rivers, streames, creekes, and places within the said limitts conteyned:* And by virtue of the said commission wee have assigned and appointed, and by these presents doe assign and appoint, the open places hereafter mentioned, to be the lawfull places, keyes, or wharfes respectively for the landing or discharging, loading or shipping of any goodes, wares, or merchandize, within the said port of Southampton, that is to say, All that open place or key called South Key or Water Gate, whereon are three paire of stone staires, viz., one paire on the south end or head, and two other paire on the east side, and conteynes in length from the Water Gate and towne wall to the head of the said key, 223 foote or thereabouts, and in breadth by the said gate and wall 190 foote or thereabouts, and in breadth at the head of the said keye, 63 foote or thereabouts; alsoe one other place or key called West Key, in length from the west gate and wall to the head of the said key, 225 foote or \*thereabouts, and in breadth at the end next the said gate and wall 58 foote or thereabouts, and in [\*318 breadth at the head of the said key 37 foote or thereabouts, which said places soe assigned and appointed are in our judgments and discretions most convenient and fitt for the uses and services aforesaid: And wee doe by these presents sett downe, appoint, and settle the extents, bounds, and limitts of the said places, keys, or wharfes, to be as aforesaid: and we doe hereby, and by virtue of the said commission, utterly prohibit, disannull, make void, determine, and debarr all other places within the said port of Southampton from the privilege, right, and benefitt of a place, key, or wharfe for the landing or discharging, ladeing or shipping, of any goodes, wares, or merchandize as aforesaid (except as in the said commission is excepted). In witnesse," &c.

The certificate then proceeded to assign and set out certain keys and landing-places in the several ports of Portsmouth and Cowes.

John Wakeham proved, that he is a master mariner, and harbour-master of the port of Southampton, and has been such for ten years; that his duties are to survey the river, and see the buoys in their places, from the Spit Buoys, on the west of the Brambles, outside the Castle, and from thence up the stream, Southampton Water, Hamble River, and Itchen, to above Mill Stone point, near Northam; that he also stations vessels along the quays and in the river, to keep it navigable; that, occasionally, he goes to the Itchen, when sent for, to move vessels; that he has occasionally gone to the dock-head, to keep the river clear, but not above that; that booming and buoying is all he does in the Itchen above the docks; that he was a passenger by the Lady of the Lake on 1st of November, from Cowes to Southampton; that, on her arrival within Calshot, she did not proceed to the [\*319 \*Royal Pier; that the weather was fine and would have permitted, and there was accommodation at the pier that day for the vessel to have landed her passengers; that, generally, there is sufficient accommodation for vessels at the pier; that he is there daily, and that, within his knowledge, there has always been accommodation; that he has the stationing of vessels there; that the Commissioners afford every accommodation at the pier; and that there are

vessels of treble the tonnage of the Lady of the Lake accommodated at the pier.

On cross-examination, he stated, that a great many ships go up the Itchen and place themselves as they like at the quays and wharfs there; that he has no jurisdiction over ships in the Itchen above the docks; that he calls the roadstead, from Calshot Castle to Redbridge; and that he considers a roadstead forms part of a port.

Thomas Powell proved, that he is employed by the Commissioners of the Royal Pier for taking in all steamboats that come there, and assists in keeping the pier clear; that he has been at the pier under the Commissioners about six years; that, before that, he was toll-collector at the gate for five years; that, during that period of twelve years, there has always been accommodation for vessels; that no vessel has come and gone away for want of accommodation; that passengers can embark and disembark at any time of tide; that he remembers the 1st of November; there was plenty of room at the pier that day; that it was a fine day, and the weather and wind permitted.

George Doswell proved, that he is surveyor to the Commissioners of the Royal Pier and the Southampton port and harbour; that he has been so six years; that his duties are to superintend all contracts and \*320] keep the pier in repair; that, upon being reported, he keeps \*in order all the booms and buoys; that he goes down as far as the Spit Buoy, where the Commissioners have a bell-buoy, and between that and as far as Cracknore Hard, he has the management of the buoys on the east and west sides; that he has also to go from Hamble as far as Bursledon, and up the Itchen as far as Mill Stone Point; that he also goes up to Eling and Redbridge; that he produces a map on which the buoys and booms are marked within those bounds; that, before he was appointed, his father held the office for many years, and that he assisted him when he got old; that he, the father, superintended these matters; that, generally speaking, there is plenty of room at the Royal Pier for steamboats; that he has recommended the Commissioners to extend certain portions of the pier; that he knows the Lady of the Lake steamer; and that there was accommodation for her there previous to the 1st of November, and up to the present time.

William Farrand proved, that he is clerk to the Commissioners of the Royal Pier, and has been such eleven years; that he is also clerk to the Commissioners of the port and harbour; that the Commissioners of the pier have borrowed 14,400*l.* on the dues of the pier, which remains unpaid; that the amount of interest annually is 720*l.*; that the annual average outlay on the Royal Pier is 626*l.* a year, and, after paying those expenses, and the interest, there is little balance; that 1800*l.* for repairs was laid out last year, and in the spring more will be laid out, which will exhaust the balance; that nothing has been paid off since 1844; that the Commissioners have recently received notice from Mr. Ambler,<sup>(a)</sup> that, if the boats did not start from the pier, he would not give so much for the pier: that the improved Isle of Wight Steam Packet Company required the exclusive accommo- \*321] dation of a \*portion of the pier, upon which the Commissioners authorized the opinion of counsel to be taken, which was done, and the result was that the Commissioners had not the

(a) The lessee of the pier dues.

power to give it; that the Company tendered for a lease of the tolls, but it was not accepted, as they did not offer so much as Mr. Ambler by 230*l.*; that he was in the habit of frequenting the pier nearly daily; that, on the afternoon of the 1st of November, there was sufficient accommodation for the Lady of the Lake to have embarked and disembarked her passengers; that for some time previously to this date the Lady of the Lake did embark her passengers there; that all vessels going into the docks pay boomage and tonnage dues, unless they belong to the port; and that vessels going to Northam do not pay tonnage.

Upon this statement of facts, it was contended, that, under the 56th section of the Pier Act, all steamboats carrying passengers were bound to come alongside the pier immediately on their arrival in the port of Southampton, if required to do so by five passengers; and that all such steamboats immediately upon their departure from such port were likewise bound to come alongside, if there were sufficient accommodation, and wind and weather permitted.

It was proved, and admitted, that, on the occasion in question, the steamboat Lady of the Lake carrying passengers, came from Cowes in the Isle of Wight, and landed the passengers at the landing-place of the Company to which the steamboat belongs, situate in the river Itchen, and that there was sufficient accommodation for such steamboat at the Royal Pier, and the wind and weather would have permitted her going there.

The whole question, therefore, turned upon what is "the port of Southampton," and what is an "arrival \*in" and "departure from" the said port, within the meaning of the 56th section of [\*322 the Pier Act.

After due deliberation, the magistrates were of opinion that the information should be dismissed, for the following reasons, viz. :—

If the expression "port of Southampton," as used in the 56th section of the Pier Act, be construed in the extended sense in which it is granted to the mayor and corporation by the charter of Charles the First, and set forth in the survey of Charles the Second, including Portsmouth and Cowes, the steamer in question neither arrived at nor departed from the port, and therefore was not obliged to come alongside the Royal Pier.

If the port of Southampton is to be taken in a more limited and restricted sense, as would seem more reasonable, for it can scarcely be imagined that the Act of Parliament contemplated that steamboats carrying passengers, and which depart from or arrive at Christchurch, Lymington, Cowes, Portsmouth, Hamble, or any other place within the extensive limits of the port defined in the survey, then they must look to the Act of Parliament itself for the true meaning and definition of the expression "port of Southampton," as used in the 56th section, and they found the port of Southampton therein mentioned must mean the same port as that mentioned in the previous clauses of the Act, and in the two Acts referred to in the preamble, viz. 43 G. 3, c. xxi., and 50 G. 3, c. clxviii.

The port of Southampton, as granted to the mayor and corporation by the charter of Charles the First, and defined in the survey of Charles the Second, is still vested in them, and has not been trans-

ferred to the Commissioners of the port and harbour, who have no jurisdiction or authority over the port and harbour in that extended sense.

\*323] In the titles and preambles, and throughout the various clauses of these two Harbour Acts, the port is called "The port of the town of Southampton," indicating a port of a more local and restricted character than that mentioned in the charter.

By section 1 of the 43 G. 3, c. xxi., the Commissioners thereby appointed are empowered to make a wet dock or basin, and to erect piers, docks, and warehouses, and to repair the then quays and wharves for the improvement of the said harbour and port, and also for the safe custody of goods and merchandise, and for the more convenient use of the same within the said port of the town and county of the town of Southampton, and for that purpose they were empowered to purchase lands, &c.

By the same section, they were empowered to place booms for marking the channel in the Southampton Water, from Calshot Castle up to the town of Southampton, and also up to Redbridge and Eling, in the Southampton river, and up to Northam, in the river Itchen; thus clearly showing a marked distinction between the port and harbour of the town of Southampton which the Commissioners were authorized to improve, and the Southampton river or water and the river Itchen, the channels of which they were authorized to mark by placing booms.

By section 6 of the said Act, it is enacted that no by-law to be made by authority of that Act should extend to any ship or vessel so as to subject the owner or master to any control or expense (except boomage duties) either at Chappel, Northam, Redbridge, Eling, and in the Hamble River; and by section 15 of the said Act, ships coming to those same places are exempted from the rates and duties imposed by the Act, except the boomage duties: thus again showing that the port and harbour of the town of Southampton which the Commissioners were empowered to improve did not include those localities.

\*324] By section 35 of the said Act, it is enacted that all vessels, &c., coming within Calshot Castle, and navigating in the water called the Southampton Water, and the rivers thereto belonging, shall, as to the payment of boomage dues, be deemed to be within the harbour of the said town of Southampton, in such and the same manner as if they came to and used the said pier, dock, or basin: again showing the distinction between the Southampton Water and the harbour of the Commissioners, and clearly indicating, that, without such enactment, vessels navigating the Southampton Water would not be deemed to be within the harbour of the town of Southampton, and limiting the effect of that enactment to the payment of boomage dues.

In the preamble of the Act of the 1 & 2 W. 4, c. i. (the Pier Act under which this information is laid), the two former Acts are recited: thus identifying the port of the town of Southampton mentioned in those Acts with the port mentioned in that Act.

In determining the true meaning of that Act, it is necessary to consider the object and purpose of passing the Act; and these are stated in the preamble, viz. to remedy the inconvenience which (not-

withstanding the enlargement of the quay and the improvement of the port) passengers experienced on landing and embarking at the said port, by the necessity of being conveyed by boats to and from the steamboats and the shore, and being detained on board the vessels by reason of the obstruction of the mud. To remedy this, the Commissioners obtained the present Act, which is in fact an enlargement of the powers contained in the former Acts; and they were thereby authorized to erect a pier or landing-place at the then breakwater of the said town of Southampton, so that vessels might be able to float alongside such pier at low water, and \*to take the tolls enumerated in the schedule to the Act, on passengers, luggage, &c., [\*325 landing at the said pier.

They were further authorized to borrow a sum of money on the security of those tolls; and by the 51st section, the Commissioners are prohibited from erecting any other landing-place for passengers in the said port of Southampton, till the money borrowed should be paid off, though they were authorized to keep in repair the then existing steps and landing-places. And it is remarkable that this prohibition extends only to the Commissioners, and not to other persons.

And by the 56th section, under which the present information is laid, steamboats are compelled to come alongside the pier to land and embark their passengers.

The scope and object, therefore, of those clauses appear to be, to prevent steamboat passengers landing at the old quays and landing-places of the Commissioners, where no tolls were taken on passengers, and to compel them to land at the new pier, where they would pay the tolls authorized by the Act, and thus secure a revenue to the Commissioners.

Upon a review of the whole matter, the magistrates were of opinion that "the port of Southampton" mentioned in the 56th section of the Pier Act, is identical with the port of the town of Southampton mentioned in the previous Acts, and which the Commissioners were empowered to improve by erecting quays, docks, and warehouses; that vessels entering the river Itchen are not subject to the authority or control of the Commissioners, except for the purpose of paying the boomage dues, and that the landing-place in question, being situated in the river Itchen, forms no part of such port of Southampton, within the meaning of the said Pier Act.

\*The case was argued by *Bovill*, Q. C. (with whom was *Bul- lar*), for the appellant, and by *Karslake*, Q. C. (with whom were *Betham* and *Macnamara*), for the respondent. [\*326

ERLE, C. J.—I am of opinion that the magistrates came to a wrong conclusion in this case. Giving the best attention I have been able to the section of the statute upon which the information was laid, it seems to me that the penalty was incurred. The question is, whether, on the occasion referred to in the information, the steam-vessel *Lady of the Lake* arrived in the port of Southampton. The master was duly required by five of the passengers to land them at the Royal Pier, and he without any lawful excuse refused to do so. Did he arrive in the port of Southampton? I answer that question in the affirmative. I do not undertake to define what are the extreme limits to which the words "the port of Southampton" may be carried: it is

enough, if the vessel in question, within the meaning of the Southampton Pier Act, 1 & 2 W. 4, c. i., came within the port of Southampton. The statute recites the 43 G. 3, c. xxi., "An Act for abolishing certain dues called petty customs, anchorage, and groundage, and for improving the port of the town of Southampton, for making a convenient dock for the security of ships, for extending the quays and wharfs, and making docks and piers in the harbour there, and for erecting warehouses for the safe custody of goods and merchandise, and for imposing certain duties for the above purposes," and also the 50 G. 3, c. clxviii., "An Act for altering and amending an Act made in the forty-third year of his present Majesty's reign, for improving the port of the town of Southampton." It then recites that "the quay of the said port of Southampton has been much enlarged, and the

\*327] avenues thereto much widened, and the port generally improved; but the said port of Southampton being a place of great public resort for persons passing and repassing to and from the Isle of Wight, the islands of Guernsey and Jersey, and to and from France, particularly by steamboats or vessels, it would much tend to the convenience and safety of passengers embarking and landing at the said port, and to the accommodation of trading vessels, if a separate and convenient landing-place were made for passengers and their baggage, to prevent any necessity for passengers being conveyed by boats to and from such steamboats or vessels from and to the shore, and being detained on board the vessels, as they now are, by reason of the obstruction of the mud, and otherwise, would be of great public utility." The Act then proceeds to appoint Commissioners; and by s. 14 it is enacted, that, "as soon as conveniently may be after the passing of this Act, it shall be lawful for the said Commissioners, and they are hereby authorized and required, to erect and build, or cause to be erected and built, a new pier or landing-place at the present breakwater of the said town of Southampton, so that vessels may be able to float alongside such pier at low water, such pier to communicate with the west end of the present Watergate Quay, at or near the bottom of Bugle Street, in the said town and county of Southampton, and to be built of stone, &c., and to excavate the soil or mud at any parts near thereto, and to make proper approaches thereto; and also to erect thereon and put up cranes, crane-houses, steps, toll-gates, toll-houses, railings, and such other erections and conveniences as the said Commissioners shall think proper, for the facilitating the landing or shipping of horses, carriages, luggage, and other goods, and for the taking the tolls thereafter allowed to be taken," &c. The 56th

\*328] section,—which is the section upon which the information is laid,—enacts "that all captains, masters, or persons in command of steamboats carrying passengers, shall, immediately on their arrival in the said port of Southampton, if required so to do by any five passengers, and provided there be sufficient accommodation for such steamboat or other vessel, and the wind and weather will permit, come alongside the said intended pier, for a sufficient time to enable passengers and their luggage to land thereat; and also shall (if carrying or being ready or willing to carry passengers) immediately before their departure from the said port of Southampton, provided there be sufficient accommodation for such steamboat or other vessel, and if

wind and weather will permit, come alongside the said intended new pier, for the purpose of enabling passengers, together with their luggage, to embark from the said intended pier: and, in case of any captain, master, or person in command of any steamboat or other vessel carrying passengers, or being ready or willing to carry passengers, refusing or neglecting to obey and follow this enactment, he or they, for every such refusal or neglect, shall forfeit and pay to the Commissioners any sum not exceeding 5*l*." I judge from the preamble, and from the 14th section, that the legislature contemplated the providing of accommodation for passengers coming to and departing from the town of Southampton; and persons coming to Northam or Chappel, which are in the parish of St. Michael in Southampton, are persons coming to the port of Southampton. Mr. *Karslake*, on behalf of the steamboat Company, contends that the 56th section refers to the town of Southampton in the immediate vicinity of the quays improved. But that would be importing words for which I find no authority. The preamble clearly is not limited to passengers coming to the old quays.

\*It has been further suggested that the 56th section cannot have been intended to apply, unless the captain can see that there is accommodation at the Royal Pier. But the answer to that is, that persons navigating to and from the port of Southampton must know the extent of the accommodation there at all times of the tide. So far, therefore, for the intention of the statute, and the actual facts. It seems from the survey of Charles II., that Itchen is clearly within the limits of the old port of Southampton. And I think the steamboat in question was going to the port of Southampton within the meaning of the statute. The legislature appear to have had two objects in view,—the convenience of passengers landing and embarking at Southampton, and the securing a fund for the Commissioners. I am clearly of opinion that the penalty was incurred.

WILLES, J.—I am of the same opinion. Construing the statute according to the subject-matter, there is no difficulty in giving effect to the words "port of Southampton." The pier was erected for the convenience of persons coming to or going from the town of Southampton. The legislature evidently meant to speak of persons who were using the port of Southampton for the purpose of passing to and from the town of Southampton. When the consequences of any other construction are looked at, it will be seen that this must be the true construction. I entirely agree with my Lord that the decision of the magistrates must be reversed, with an intimation to them that there ought to be a conviction.

BYLES, J.—I am of the same opinion. It is impossible to give any effect to this Act of Parliament without construing "the port of Southampton" to mean \*the port in the narrower sense contended for by Mr. *Borill*. The object of the erection of the pier was, the accommodation of passengers to and from Southampton and the Isle of Wight and the other places named in the preamble. If those words are to be taken in the larger sense contended for by Mr. *Karslake*, the consequence will be that persons coming to Southampton from the Isle of Wight, or going from Southampton to the Isle of Wight, would be deprived of the advantage which the preamble

and the 1st section of the statute show was especially devised for their convenience. It is unnecessary to say whether the definition of the port of Southampton in the return to the commission in the 32 Car. 2, is correct. I think we must adopt the rule which the Court of Queen's Bench adopted in the case of *The Dock Company at Kingston-upon-Hull v. Browne*, 2 B. & Ad. 43 (E. C. L. R. vol. 22). The port of Kingston-upon-Hull is mentioned in Acts of Parliament, charters, and other documents, in two senses,—first, according to the popular understanding, as denoting a particular place,—and, secondly, in a larger acception, as comprising under one name a district of many places classed together for the purposes of the revenue, and of which Kingston-upon-Hull is the chief. And the Court held that the statute 14 G. 3, c. 56, s. 42, which gives the Hull Dock Company a tonnage on ships coming into or going out of the harbour of Kingston-upon-Hull, and the Company's basin or docks within the port of Kingston-upon-Hull, *or unlading or lading any of their cargoes within the said port*, must be construed as using the term "port" in the popular sense, and not therefore as extending the burthen of dock dues to places which, in point of local description, are without the port of Hull,—as, Goole, on the river Ouse. The magistrates appear to have given very \*331] great attention to the matter: but I cannot help \*agreeing with my Lord and my Brother Willes that the view they have taken is erroneous.

KEATING, J.—I am of the same opinion. Though I think their decision was erroneous, I think the magistrates may very well be excused for entertaining the opinion they did. The paramount object of the Southampton Pier Act was to secure to those frequenting the town of Southampton a safe and convenient access by means of this pier. The 51st section, which restrains the Commissioners from building another pier until the debts of the intended pier should have been fully satisfied, strongly corroborates our view of the intention of the legislature. To construe the Act as the magistrates construed it, and in the way Mr. *Karslake* has contended for, would utterly defeat that intention. It is not necessary for us to lay down the exact limits of the port: it is enough for us to say that the natural meaning of the words of the statute includes the spot in question.

*Bovill*, for the appellant, asked for costs.

ERLE, C. J.—In deference to the opinion of the magistrates, and considering the nature of the question, we do not think it a case for costs.

Decision reversed, without costs.

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\*RICE v. SHEPHERD. April 16.

The husband is liable to an action at the suit of his wife's solicitor, for costs necessarily incurred by her in filing a petition in the Divorce Court for a judicial separation on the ground of cruelty and adultery, although the petition is not proceeded with, and the course prescribed by the practice of the Divorce Court for obtaining the wife's costs has not been pursued.

THIS was an action upon a solicitor's bill for business done upon the retainer of the defendant's wife on a petition filed by her in the

Divorce Court for a judicial separation on the ground of cruelty and adultery, in which the proceedings had been stayed.

The cause was tried before Willes, J., at the sittings in Middlesex after last term, when a verdict was found for the plaintiff, damages 40*l.* 1*s.* 6*d.*, leave being reserved to the defendant to move to enter a verdict for him, if the Court should be of opinion that he was not liable for the costs under the circumstances.

*Denman*, Q. C., now moved accordingly.—It must be conceded that the petition alleges acts which, if proved, would make out a case of cruelty against the husband. In *Brown v. Ackroyd*, 5 Ellis & B. 819 (E. C. L. R. vol. 85), it was held, that, if a wife, from reasonable apprehension of personal violence, leave her husband's house, and it becomes necessary, for her protection, that she should obtain a divorce a mensâ et thoro, the law gives her authority to pledge her husband's credit for the expenses of the proceeding; and that the question of the husband's liability, is, whether, at the commencement of the proceeding, there was such reasonable ground in fact for anticipating ill treatment that the divorce was necessary for the protection of the wife. But there, the proctor had no other remedy for his costs than by bringing an action. Now, according to the practice of the Divorce Court, the wife loses her remedy for costs, if she neglects to procure them to be taxed *de die in diem*: *Keats v. Keats*, 28 Law J., Prob. & Mat. Cas. 57. The proctor or solicitor has no right to let the time go \*by for tax- ing the costs, and then turn round and sue the husband. [\*333]

*ERLE*, C. J.—The only question here is, whether the cause of action is disproved by the matter alleged. Assuming that such cruelty is alleged in the petition as would entitle the wife to the relief she prayed, the case of *Brown v. Ackroyd*, 5 Ellis & B. 819 (E. C. L. R. vol. 85), has established that a wife has a right to pledge her husband's credit for the costs of a suit rendered necessary by his conduct. No doubt such costs come under the description of a "necessary." The wife pledges her husband's credit at the beginning of the suit: and I see nothing in the practice of the Divorce Court to take away the wife's common-law right. The right to apply for a taxation *de die in diem* is a concurrent or cumulative remedy, and may well co-exist with the common-law right to bring an action.

*WILLES*, J.—I am of the same opinion. It is admitted that the proceedings in the Divorce Court were necessary for the protection of the wife, and therefore *Brown v. Ackroyd* shows that the action is maintainable. As to the mode of making the husband pay in the Divorce Court, that is only one of the numerous methods of giving a remedy. The action at common law is not taken away.

The rest of the Court concurring,

Rule refused.

**\*334] \*PHENÉ v. POPPLEWELL and Another. April 17.**

An agreement by landlord and tenant that the term shall be put an end to, acted upon by the tenant's quitting the premises, and the landlord by some unequivocal Act taking possession, amounts to a surrender by operation of law.

Where, therefore, the tenant left the key at the counting-house of the landlord, and the latter, though he at first refused to accept it, afterwards put up a board to let the premises, and used the key to show them, and painted out the tenant's name from the front:—

Held, sufficient evidence of a surrender by operation of law.

THIS was an action in which the plaintiff sought to recover from the defendants rent of certain premises for three quarters, commencing on the 25th of October, 1861.

The cause was tried before Willes, J., at the sittings at Westminster after last Term, when the following facts appeared in evidence:—The original letting was under a void agreement for seven years, commencing on the 25th of January, 1858, at the yearly rent of 75*l.*, payable quarterly. The defendants took possession under the agreement, and continued to occupy the premises as tenants from year to year until the month of March, 1861, when they assigned all their property for the benefit of their creditors, and quitted the premises, tendering the key to the plaintiff (the landlord), who however declined to receive it. Ultimately, on the 12th of April, the defendants left the key at the plaintiff's counting-house, and it was not returned. Nothing further was done until the 4th of May, when the plaintiff went upon the premises and caused the front of the house to be washed down; and in June the key was given to an auctioneer to enable him to show the premises, and a board put up intimating that they were to let. The defendants' names were painted out on the 24th of September; and on the 26th of October, the landlord gave them a formal notice that he had resumed the possession.

The defendants paid into Court 18*l.* 15*s.* to cover the quarter's rent down to the 25th of April: but they insisted that the return of the key, coupled with the acts of the landlord subsequently to that date, amounted to a surrender by operation of law.

The learned Judge, being of this opinion, directed a verdict to be **\*335]** entered for the defendants, reserving leave **\*to** the plaintiff to move to enter a verdict for the amount of two quarters' rent, if the Court should be of a contrary opinion,—the Court to be at liberty to draw such inferences from the facts as a jury would have been warranted in drawing.

*Karelake*, Q. C., in Hilary Term last, obtained a rule nisi to enter a verdict for the plaintiff for 38*l.* 5*s.*, on the ground that the facts proved did not show that the tenancy was ended. He referred to *Redpath v. Roberts*, 3 Esp. N. P. C. 225, to show that the mere putting up a bill and endeavouring to let the premises is no determination of the contract of tenancy.

*Parry*, Serjt., and *H. Lloyd* now showed cause.—The acts of the landlord in cleaning and repairing and endeavouring to let the premises, coupled with the fact of his having kept the key, were clearly sufficient to warrant a jury in finding that the tenancy was put an end to. In *Gore v. Wright*, 8 Ad. & E. 118 (E. C. L. R. vol. 35), 3 N. & P. 243, to debt for 63*l.* rent for two years and one quarter due

the 25th of March, 1837, reserved on a demise for forty-five years at 28*l.* per annum, the defendant pleaded, that, before any part of the sum claimed became due, and more than two years and a quarter before the 25th of March, 1837, and before the 25th of December, 1834, viz. on the 17th of April, 1834, the plaintiff and defendant agreed that the defendant should give up, and the plaintiff take, possession of the premises before the 25th of December, 1834, in consideration whereof the defendant should be discharged from the rent which would have become due for the occupation after the 25th of December, 1834; the possession was given up by the defendant and accepted by the plaintiff accordingly: and that the plaintiff entered on the 17th of April, 1834, and \*held ever since, and the [\*336 defendant had not held since,—“and the said tenancy and the defendant's said interest were thereby then surrendered and extinguished:” and it was held, that, on this plea, the objection did not arise whether the term was shown upon the record to be regularly surrendered according to the Statute of Frauds, 29 Car. 2, c. 3, s. 3,—the defence being merely an executed contract, that, in consideration of the defendant's giving up possession, the plaintiff should abandon his claim to the rent; and that such defence was valid. In *Griffith v. Hodges*, 1 C. & P. 419 (E. C. L. R. vol. 12),—which will probably be relied on,—the landlord (of lodgings) was held not to have resumed possession by merely causing a fire to be lighted in one of the rooms for the purpose of roasting a hare. And in *Redpath v. Roberts*, 3 Esp. N. P. C. 225, all the landlord did, was, to put up a bill announcing the premises to let. Here, however, besides retaining the key, the landlord proceeds to repair the premises, and removes the tenants' names from the front. That clearly amounted to evidence, and strong evidence, that the tenancy had been put an end to by mutual consent.

*Karslake, Q. C., and Francis*, in support of the rule.—The fact of the non-return of the key by the landlord amounts to nothing; for, the tenants had quitted in a state of insolvency, and were not to be found; and, besides, they might at any time have redemanded it. The facts relied on here fall very far short of those pleaded in *Gore v. Wright*. Then, is any agreement for a dissolution of the contract to be inferred from the subsequent conduct of the landlord? The attempts to let amount to nothing: *Redpath v. Roberts*, 3 Esp. N. P. C. 225; *Doe d. Huddleston v. Johnston*, M'Clell. & Y. 141.† In the last-mentioned case, a tenant from year to year by a Lady Day holding agreed by *parol* with his \*landlord's agent, to quit at the ensuing Lady [\*337 Day, which was within half a year; and the premises were relet by auction, at which the tenant attended and bid, but the new tenant was not let into possession: and it was held that the tenancy was not determined, there not having been either a sufficient notice to quit, or a surrender by operation of law, within the meaning of the Statute of Frauds. It is hardly possible to conceive circumstances stronger than those relied upon there. A mere *parol* license to a tenant to give up the premises is not sufficient to constitute a surrender by operation of law: there must be some unequivocal act, which the landlord is estopped from disavowing; such as an actual taking of possession, or the letting in a new tenant. In *Whitehead v. Clifford*, 5 Taunt. 518 (E. C. L. R. vol. 1), it was held, that, if a land-

lord in the middle of a quarter accepts from his tenant the key of the house demised, under a parol agreement, that, upon her then giving up the possession, the rent shall cease, and she never afterwards occupies the premises, he cannot recover in an action for the use and occupation of the house for the time subsequent to his accepting the key. Gibbs, C. J., there says: "The action for use and occupation depends either upon actual occupation, or upon an occupation which the defendant might have had, if she had not voluntarily abstained from it. Here, the plaintiff himself takes possession of the house, and makes the profit of the premises; it was, therefore, impossible for the defendant during the same time to have used and occupied the premises, if she would. As to the case in Campbell,<sup>(a)</sup> it is very \*338] different from this, and we do not throw out any opinion against it; but, when the like circumstances arise, it will be proper to consider them." What was there here to prevent the tenants from having the enjoyment of the premises? In *Thomas v. Cook*, 2 B. & Ald. 119, the circumstances which were held to constitute a valid surrender by act and operation of law, were unequivocal; the landlord had accepted a new tenant, upon whose goods he had distrained. [WILLES, J.—Surrender by operation of law is as old as the time of Lord Coke.] There must be some decisive act on the part of the landlord showing his intention to deprive the tenant of his estate. *Bessell v. Landsbery*, 7 Q. B. 638 (E. C. L. R. vol. 53), is also strong to show how unequivocal the act must be to operate a dissolution of the tenancy. There, a tenant from year to year gave his landlord notice to quit, ending at a time within half a year: the landlord at first acquiesced, but ultimately refused to accept the notice: the tenant quitted according to his notice, and the landlord entered and \*339] did some repairs: and it was held that the tenancy was not determined. [BYLES, J.—Who by the terms of the agreement here was bound to do the repairs?] The tenants. [BYLES, J.—Then, the landlord had no right to go upon the premises to repair them.] The facts as to the second quarter, viz. from April the 25th to July the 25th, differ somewhat from those applicable to the quarter ending on the 25th of October.

ERLE, C. J.—I am of opinion that this rule should be discharged: and I have come to the conclusion that there was a surrender of the premises to the landlord by act and operation of law. The tenancy was a tenancy from year to year, at a rent payable quarterly. On the 12th of April (before the first quarter's rent became due), the key

(a) *Mollett v. Brayne*, 2 Campb. 103. There, the defendant took the premises in question of the plaintiff at Lady-Day, 1808, at the yearly rent of 42l. In the November following, disputes arose between the parties as to the doing of some repairs. The defendant then threatening to quit the premises, the plaintiff said, "You may quit when you please." The defendant accordingly left the premises a few days after, and tendered the plaintiff rent for a day beyond the time he had occupied them. This sum was paid into Court upon the tender pleaded: and the question was whether the plaintiff was entitled to rent after the defendant had quitted. Lord Ellenborough was of opinion that the tenancy was not determined merely by the landlord giving the tenant a parol license to quit, and the tenant quitting accordingly. "At that time," says his Lordship, "there was a subsisting term in the premises; and that the Statute of Frauds provides that no lease or term of years or any uncertain interest of or in any messuages, lands, tenements, or hereditaments, shall be surrendered, unless by deed or note in writing, or by Act and operation of law. Here, there was no deed or note in writing; and nothing was proved which can be considered a surrender by operation of law."

was left by the tenants at the counting-house of the landlord, with the intention of relinquishing the tenancy; and it remained on the landlord's premises. It is true that the tenants' offer was not then accepted: but the leaving the key with him was a continuing offer on the part of the tenants; and as soon as the landlord did an act which would have constituted him a trespasser if he had not exercised the option thus given to him, that afforded ground for the inference that he assented to the tenancy being put an end to. It was evidence to that effect. His taking the key and showing the premises with a view to letting them, knowing that the tenants were insolvent, and his putting up a board announcing that the premises were to let, was also evidence of an election on his part to assent to the proposal of the tenants, and may be coupled with the subsequent painting out of the defendants' names and the taking actual possession after the 25th of October. Putting all these together, I can come to no other conclusion than that the landlord exercised his option to accept the surrender. That the resumption of premises by the landlord \*with the assent of [340 the tenant constitutes a surrender by act and operation of law, is clear from the cases of *Grimman v. Legge*, 8 B. & C. 324 (E. C. L. R. vol. 15), 2 M. & R. 438, and *Dodd v. Acklom*, 6 M. & G. 672 (E. C. L. R. vol. 46), 7 Scott N. R. 415. This mode of putting an end to a tenancy has undoubtedly been productive of much litigation from the time of Lord Ellenborough downwards. But I think the cases of *Grimman v. Legge* and *Dodd v. Acklom* have put the matter upon a proper foundation: anything which amounts to an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession of the premises amounts to a surrender by operation of law. I think that is a very salutary rule. The cases of *Griffiths v. Hodges*, 1 C. & P. 419 (E. C. L. R. vol. 12), *Redpath v. Roberts*, 3 Esp. N. P. C. 225, and *Bessell v. Landsberg*, 7 Q. B. 638 (E. C. L. R. vol. 53), show only, that, in the opinion of the learned Judges who decided them, the evidence was not sufficient to establish a surrender by operation of law. I think the ruling of my Brother Willes at the trial was quite right, and that the rule must be discharged.

WILLES, J.—I am of the same opinion. There is nothing inconsistent with law in holding an agreement by the tenant to relinquish and by the landlord to resume the possession of the land to revert the term in the landlord. The common law conveyance, before the Statute of Frauds, was a notorious act indicating a change of the possession. That statute requires the conveyance to be by writing in most cases, in the case of a surrender amongst others; but it expressly excepts surrenders by act and operation of law, which therefore remain as they were at common law. Now, one way in which there might be a surrender of a term by the common law, was, by the tenant taking a new lease, even for a shorter term, and to commence in \*futuro, [341 provided the new lease coincided with any part of the term created by the old one. Thus, a lease for a thousand years might be surrendered by the tenant taking a new lease for two or three years, to commence at any time before the expiration of the thousand years term. That is giving a far greater effect to the act of the parties than that which is given here. There are many other ways in which a surrender by act and operation of law may take place: for instance,

where the landlord and tenant have by mutual agreement consented that the term shall be put an end to, and the possession is changed in consequence, whether the landlord re-enters by himself or by a new tenant, that constitutes a surrender by operation of law. There is no difference in principle between that case and the taking of a new lease. The intention of the parties is to be made out by the circumstances. What are the circumstances here? The tenants had failed in business, and wished to retire from the premises. This was known to the landlord, as also that the tenants were very unlikely to be able to pay the rent. When the key was offered to him, the landlord refused to accept it; but he allowed it to be left at his counting-house. I agree with my Lord, that the leaving the key with the landlord was a continuing offer on the part of the tenants to relinquish possession. That offer was not at the time accepted, and therefore I think the defendants were well advised in paying into Court enough to cover the rent to the 25th of April. They might have retracted their offer to give up the possession; but they did not do so: and the landlord, whilst that offer was continuing, assents to it by putting up a board and endeavouring to let the premises, entering with the key and showing them to persons he intended to put in as his tenants. These, it may be said, were equivocal acts. But the painting out the defendants'

\*342] \*names during the next quarter was not so equivocal. That, followed by the notice of the 26th of October, that he had taken possession, shows that the putting up the board and endeavouring to let the premises were done in exercise of ownership, and not mere gratuitous acts done for the benefit of the tenants. The case of *Redpath v. Roberts*, 3 Esp. N. P. C. 225, is distinguishable. There, no act was done by the tenant showing his assent to what the landlord did. *Doe d. Huddleston v. Johnston, McClell. & Y.* 141,† is also distinguishable, on the ground that there nothing was done by the landlord which was equivalent to an entry by him in pursuance of the agreement: and it may be well to consider whether that case is not qualified by the decision of the Court of King's Bench in *Gore v. Wright*, 8 Ad. & E. 118 (E. C. L. R. vol. 35), 3 N. & P. 243.

BYLES, J.—I also am of opinion that this rule should be discharged, though I must confess I find it extremely difficult, to say the least of it, to reconcile all the cases upon the subject. It seems, however, to be plain from them all, that, where there is an agreement between the landlord and the tenant that the latter shall relinquish and the former resume possession of the premises, and that agreement is acted upon by a change of possession, that amounts to a surrender by act and operation of law, within the 3d section of the Statute of Frauds. The first thing to be ascertained here is the agreement, the will of the landlord and of the tenants, and its expression. The tenants, it seems, were in embarrassed circumstances, having failed in business. Having quitted the premises, and being desirous of relieving themselves from the burthen, they sent the key to the landlord's counting-house. Their wish to resign the tenancy was incontrovertible, and was known \*343] to the landlord. The landlord, when \*the key was first left with him, was not willing to accept the premises: but the facts show abundantly that he afterwards changed his mind. Early in May, he put up a board announcing that he was desirous of letting

the premises. He afterwards made use of the key so left with him, to let persons in to view the premises. In September, he painted out the tenants' names: and, on the 26th of October, he gave them formal notice that he had taken possession. These latter were not acts of an equivocal character, and they may well explain the earlier acts which in themselves were equivocal. Upon the whole, I think there was ample evidence to show an agreement between the landlord and the tenants that there should be a change of possession before either of the last two quarters' rent became due.

KEATING, J.—I am of the same opinion. Any agreement between landlord and tenant which results in a change of the possession,—whether the former acts upon the agreement by reletting, or by taking possession himself, or by some unequivocal acts showing his assent thereto,—will amount to a surrender by act and operation of law. It appears to me that the facts are ample to show that such an agreement was made in this case and acted upon by both parties.

Rule discharged.

The third section of the Statute of Frauds, 29 Car. 2, c. 3, remains in force in some of the United States, and in others has been substantially re-enacted. Its application has given rise to considerable diversity both in England and in this country.

Baron Parke (now Lord Wensleydale), in the thoroughly considered judgment which he delivered in *Lyon v. Reed*, 13 Mees. & Wels. 285 (1844), limits the application of the term "surrender by operation of law" to cases "where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. The law there says the act itself amounts to a surrender." One who has committed an act inconsistent with his estate, is concluded by his conduct, and forfeits his estate. The question is how far this doctrine of constructive forfeiture shall be extended.

Where, as in *Grimman v. Legge*, and *Dodd v. Acklom*, cited in the argument of the principal case, the agreement of the tenant to relinquish and of the landlord to resume possession, has been carried into effect by a change of

possession, there is said to be a surrender in law, though it might be advisable to add such cases to the well-known class of executed contracts which are taken out of the statute by reason of their having been acted upon. In the principal case the evidence was deemed sufficient to put it in this category. Similar evidence was also held sufficient in *Dos Santos v. Hollingshead*, District Court, Philada., Hare, J., 17 Leg. Int. 132. Simple abandonment of the premises by the tenant, it was held, justified the landlord in resuming possession, which determined the tenancy; but this decision was not made in a case under the statute, for the term in question being for less than three years, was held not to require more for its surrender than for its constitution. An oral surrender *in fact*, therefore, was all that the case called for: *M'Kinney v. Reader*, 7 Watts (Pa. 1838) 123.

*Thomas v. Cook*, 2 B. & Ald. 119 (1818), the leading case which has given rise to the prevailing dissension, was this: A tenant substituted for himself, with the assent of the landlord, another tenant; which substitution, it was held, constituted a surrender in law. A recent American

case on all fours with *Thomas v. Cook*, was held to be a surrender *in fact*, which the statute requires to be in writing: *Bailey v. Wells*, 8 Wisconsin 141 (1859). It may be doubted whether such a substitution can, with propriety, be termed a surrender of either sort; it resembles rather an assignment. The term is not yielded up to the landlord, and thereby extinguished, but it is treated as still subsisting, and is assigned over to a third person. This constitutes an assignment: *Frank v. Maguire*, 6 Wright (Pa. 1862) 77. Where the tenant assigns over his term, and the landlord recognises the new tenant, the privity of estate between the original parties is dissolved, and with it all liability, not otherwise incurred, is discharged: *Bain v. Clark*, 10 Johns. (N. Y. 1813) 424; *Dewey v. Dupuy*, 2 W. & S. (Pa. 1841) 183; *Fisher v. Milliken*, 8 Barr (Pa. 1848) 111; *Ghegan v. Young*, 11 Harris (Pa. 1854) 18. An assignment is thus as effectual to work a complete change of the tenancy as a surrender. This, however, is not the practical object in view. If by the lax employment of a term, an oral agreement can be converted into a surrender in law, the statute will be evaded and neither a written surrender nor assignment will be rendered necessary. It is to avoid the inconvenience of complying with the statute that the loose fashion has come into vogue of turning all substitutions indiscriminately into "surrenders by operation of law." The result of this confusion is that every distinguishing mark which separated

the once well-defined classes has been obliterated. The statute has, therefore, nothing upon which to work; it would be absurd to require a surrender to be by writing, and in the same breath to allow the same surrender to be made orally; yet this is the point to which the law has been brought by the attempts to evade the statute. Thus *Nickells v. Atherstone*, 10 Ad. & Ell. N. S. 944 (1847), decided that the substitution by the landlord of another tenant for, and with the assent of, the original tenant, constituted a surrender by operation of law. The Court of Queen's Bench refused to put the decision upon the ground of an eviction of the original tenant, because the substitution was made with his consent. The Judges rested their decision squarely upon the doctrine that a substitution works a surrender by operation of law. *Lynch v. Lynch*, 6 Ir. L. R. 131, applied the doctrine to a freehold, though Sir Edward Sugden (now Lord St. Leonards) then Lord Chancellor of Ireland, questioned the existence in law of the principle, and approved entirely of the position taken by Baron Parke in *Lyon v. Reed*: *Creagh v. Blood*, 3 Jones & La Touches 138 (1845). As the law now stands, therefore, a surrender by operation of law is restricted in extent, in accordance with Lord Wensleydale's definition, to an estoppel, which operates independently of intention, at least in estates lying in grant, and perhaps in estates which lie in livery, though the latter point is in controversy.

**\*BRADSHAW v. BEARD.** *April 29.*

[\*344]

The defendant's wife many years ago voluntarily left his house, and went to reside at her brother's about a mile distant, where she continued to live apart from her husband until her death, when her brother, without any communication with the husband, buried her in a suitable manner:—Held, that the brother was entitled to sue the husband for the expense of the funeral.

THIS was an action for money paid, &c., and for money found due upon accounts stated. Plea, never indebted.

The cause was tried before Byles, J., at the second sitting at Westminster in Hilary Term last. The facts which appeared in evidence were as follows:—

About ten years ago, the defendant and his wife (who was the sister of the plaintiff) quarrelled, and she left her husband's house, Littlehulme, in Cheshire, and went to the plaintiff's, at the distance of a mile, where she continued to reside until the time of her death in August, 1860. Upon that event taking place, the plaintiff, without communicating with the defendant, employed an undertaker to bury her. The defendant, although he knew what was taking place, did not in any way interfere. There was conflicting evidence as to whether or not the conduct of the defendant had been such as to warrant his wife in departing from her home. The action was brought, as well to recover for necessities supplied to the wife whilst so living apart from her husband, as for the expenses of the funeral, which amounted to 8*l*.

The jury found that the defendant's wife left him of her own free will, and not at his desire, or in consequence of any cruelty on his part; and that the funeral was conducted by the plaintiff without any understanding or intimation from the defendant that he would not bury his wife: and accordingly they returned a verdict for the defendant.

The learned Judge, however, reserved leave to the plaintiff to move to enter a verdict for 8*l*., the amount of the funeral expenses.

\**Shee*, Serjt., in Hilary Term last, moved for a new trial as for a verdict against evidence, and also to enter the verdict for 8*l*. pursuant to the reservation of the learned Judge. He submitted, that, the wife having died in the plaintiff's house, he was bound to bury her: and he relied on the case of *Ambrose v. Kerrison*, 10 C. B. 776 (E. C. L. R. vol. 70), where it was held that a husband is liable for the necessary expense of the decent interment of a wife from whom he has been separated,—*Jervis, C. J.*, saying: "There can be no question that an undertaker who performs a funeral may recover from the executor of the deceased (having assets) the reasonable and necessary expenses of such funeral, without any specific contract. That liability in the executor is founded upon the duty which is imposed upon him by the character he fills, and a proper regard to decency, and to the comfort of others. And I think the same reasons which call upon the executor to perform that duty, cast at least an equal responsibility upon the husband of a deceased wife, and, without any express authority or request on his part, compel him to recoup one who has performed the funeral. I see no difference in principle

between the case of an undertaker and that of a third person who takes upon himself to employ and to pay the undertaker. In point of fact, the undertaker does not do all the work himself: he employs others to assist him. If, therefore, the circumstances of this case would cast a duty upon the husband to pay an undertaker,—which I think they do,—it seems to me, upon the reason of the thing, as well as upon the authority of *Jenkins v. Tucker*, 1 H. Bl. 91, that the plaintiff, though a volunteer, is equally entitled to maintain an action against the husband for money paid."

\*346] ERLE, C. J., after time taken to confer with Byles, J., \*said that the Court were prepared to grant a rule to enter a verdict for the plaintiff for 8*l.*, upon the point reserved as to the liability of the husband to pay for his wife's decent interment, although she had been voluntarily living apart from him: but that, with regard to the other part of the rule, as the learned Judge, although he intimated that he would have been better satisfied if the verdict had been the other way, was not prepared to say that it was wrong, the Court certainly would not have granted a rule on that point only. As, however, the rule was to go on the one point, they left it to the discretion of counsel to draw it up on both points or on one only, as he thought fit.

The learned Serjeant elected to take the rule upon both points: but eventually it was only argued as to the point of law.

*Parry*, Serjt., and *Morgan Lloyd* now showed cause.—The husband's liability for the wife's funeral expenses is put upon the same footing as the liability for necessities supplied to her in her lifetime. The ground upon which the husband is made chargeable, is, that it is his misconduct which has cast the burthen of his wife's maintenance upon another.(a) *Ambrose v. Kerrison* is altogether distinguishable from the present case. There, the husband was not to be found; and the decision proceeded upon the supposed authority of *Jenkins v. Tucker*, in which case it appeared that the husband had gone abroad and left his wife, and there was probably no way of communicating with him. Here, however, the husband was living only a mile off, and yet no notice \*347] was given to him; and the jury expressly \*negatived misconduct on his part. [BYLES, J., referred to *Chapple v. Cooper*, 13 M. & W. 252,† where it was held that an infant widow is bound by her contract for the furnishing of the funeral of her husband, who has left no property to be administered.] That raises a different point. In *Ambrose v. Kerrison*, the liability of the husband and that of an executor (having assets), are put upon the same footing. In *Brice v. Wilson*, cited in *Green v. Salmon*, 8 Ad. & E. 349 (E. C. L. R. vol. 85), 3 N. & M. 512 (E. C. L. R. vol. 28), Patteson, J., says: "Several cases show that an executor is liable for a funeral, though not ordered by him, so far as it is suited to the testator's degree, *when credit has not been given to any other person*. But where credit has been given to some other person, no case shows that the executor can be liable." [WILLES, J.—The executor is only liable where he has assets, or where he gives the order himself.] Every case must depend upon its own peculiar circumstances.

*Shee*, Serjt., and *M'Intyre* were not called upon to support the rule.

(a) See the case of *Manby v. Scott*, 1 Siderfin 109: and see *Rice v. Shepherd*, *anté*, p. 332.

ERLE, C. J.—I am of opinion that the rule to enter a verdict for the plaintiff for 8*l.* should be made absolute. The circumstances under which the wife was living apart from her husband in this case must be assumed to be these:—They were not parted by mutual consent; nor did the wife leave her husband's roof in consequence of any cruelty or other misconduct on his part; but she left voluntarily, under very peculiar circumstances, and she died in the house of her brother, where she had resided for a considerable number of years: and upon her death he buried her in a manner suitable to her position in life. It is clear to my mind that the husband is liable for the amount expended by the \*plaintiff for that purpose. The case of *Am- [348* brose v. Kerrison, 10 C. B. 776 (E. C. L. R. vol. 70), is precisely in point. There, as here, the husband might have been applied to to bury his wife; and yet the Court held that he was bound to recoup the person who had taken upon himself the performance of that duty. I am wholly unable to discover any sensible ground of distinction between that case and the present.

WILLES, J.—I am entirely of the same opinion. It seems to me not to be at all unreasonable, but on the contrary, quite reasonable and proper, that the husband should be bound to provide Christian burial for his wife. According to our law, every person is entitled to a place where his bones may be at rest. *Primâ facie*, every person has a right to be buried in the churchyard of the parish in which he dies. In *The Queen v. Stewart*, 12 Ad. & E. 773 (E. C. L. R. vol. 40), 4 P. & D. 349, it was held by the Court of Queen's Bench that every person dying in this country, and not within certain ecclesiastical prohibitions, is entitled to Christian burial; and, where no such prohibition attaches, it seems that every householder in whose house a dead body lies is bound by the common law to inter the body decently; and that, upon this principle, where a body lies in the house of a parish or union, the parish or union must provide for the interment. The law, therefore, has provided not only for the place where the burial is to take place, but also who shall be charged with the performance of the duty. Where the deceased has a husband, the performance of that last act of piety and charity devolves upon him. The law makes that a legal duty which the laws of nature and society make a moral duty. And, upon his default, the law obliges him to recoup the reasonable expenses of the person who performs it for him. I do not refer \*to the case of an executor, which stands upon a [349 totally different footing. I am not, therefore, surprised to find that there are two authorities in this Court, *Jenkins v. Tucker*, 1 H. Bl. 91, and *Ambrose v. Kerrison*, 10 C. B. 776 (E. C. L. R. vol. 70), which support this view; and I feel no alarm that this doctrine may induce a stranger to thrust himself in between husband and wife for the mere purpose of preventing the husband from performing that duty himself. Generally speaking, parties are not allowed to claim in respect of moneys expended for others without request. If the plaintiff here had been shown to have been guilty of any fraud, in concealing from the husband the fact of his wife's death, and so preventing him from performing the last duty to her remains, the case would have presented a very different aspect. But I see no reason for imputing any such misconduct to the plaintiff. Therefore I think the

plaintiff is entitled to recover the reasonable expense incurred by him in the performance of that duty which the defendant ought to have discharged, but has failed to discharge.

BYLES, J., and KEATING, J., concurring,

Rule absolute accordingly.

\*350] \*OXLADE v. THE NORTH-EASTERN RAILWAY COMPANY. May 3.

The affidavit in support of an application for leave to deliver interrogatories must state that the party will derive benefit *in the cause* from the discovery which he seeks.

But, where the party sues or defends *in person*, the affidavit of an attorney or agent will be dispensed with.

THE plaintiff in person took out a summons before Williams, J., at Chambers, calling upon the defendants to show cause why the plaintiff should not be at liberty to deliver interrogatories under the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.(a)

The learned Judge rejected the application, on the ground that there was no affidavit of *the plaintiff's attorney*.(b) and also that the plaintiff's affidavit that he would derive material benefit from the discovery, omitted the words "in this cause;" but he referred the plaintiff to the Court.

The plaintiff now applied with a fresh affidavit in the proper form, but stated that he could not comply with the other requisition, inasmuch as he was suing *in person*.

\*351] \*WILLES, J.—The affidavit should contain the words "in this cause." But the fact of no attorney joining in the affidavit is not material. It never could have been the intention of the legislature that a party suing in person should be deprived of the benefit of filing interrogatories. The Court will, therefore, grant you a rule, if you think fit. But the better way, perhaps, will be, to renew the application at Chambers, upon the amended affidavit.

BYLES, J.—When you inform my Brother Williams that the Court hold the present affidavit to be sufficient, he will act upon it.

Mr. Oxlade repeated his application at Chambers, and it was granted.

(a) See the section, *antè*, p. 249.

(b) Which enacts that "the application for such order shall be made upon an affidavit of the party proposing to interrogate, and *his attorney or agent*, or, in the case of a body corporate of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit *in the cause* from the discovery which he seeks, that there is a good cause of action or defence upon the merits, and, if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay: provided that, where it shall happen from unavoidable circumstances, that the plaintiff or defendant cannot join in such affidavit, the Court or Judge may, if they or he think fit, upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order that such interrogatories may be delivered without such affidavit."

In re MATTHEW BREDEN. *June 5.*

The Court will permit the service under unstamped articles of clerkship to be reckoned from their date, where the omission to pay the duty at the proper time was the result of an emergency which may be justly inferred to have been unforeseen by the party,—the stamp having been since affixed under the authority of the Commissioners of the Treasury.

B. had been managing clerk to an attorney who died, leaving a widow and a son too young to carry on the business. He gave his services to the family and to a friend of the family (an attorney), in order to keep the business together until the son should be admitted. The son, as soon as he was admitted (in June, 1858), gave him his articles, and the widow promised to pay the stamp-duty, as a reward for the great service he had rendered the family. Trusting to the widow's promise, he continued to serve under the articles; and he did not discover that the money had not been paid until after the expiration of the six months allowed by the statute (6 & 7 Vict. c. 73, s. 8) for filing the affidavit and enrolling the articles. In January, 1862, he petitioned the Lords of the Treasury (having then procured the money himself), who allowed the articles to be stamped on payment of the duty and the penalty under the 19 & 20 Vict. c. 81, s. 3:—The Court, under the circumstances, and after conferring with the Court of Queen's Bench, permitted the affidavit of the execution of the articles to be filed and the articles to be enrolled *nunc pro tunc*, and the service under the articles to count from the date of their execution.

MONTAGU CHAMBERS, Q. C., moved that the affidavit of the execution of the articles of clerkship of Matthew Breden be enrolled *nunc pro tunc*, and the \*service be permitted to count from the date [\*352 of the articles. The motion was founded upon the affidavits of Mr. Breden and of Mr. William Neal. Mr. Breden's affidavit was as follows:—

"1. I was, for several years previous to the year 1854, managing clerk to one Samuel Neal, of, &c., a solicitor of the High Court of Chancery, and one of the attorneys of the Courts of Queen's Bench, Common Pleas, and Exchequer, in his said business of such solicitor and attorney, and was so at the time of his death, which occurred in January, 1854.

"2. William Neal, a son of the said Samuel Neal, was by articles of clerkship duly executed to the said Samuel Neal in his lifetime bound to the said Samuel Neal, with a view to his being admitted a solicitor and attorney, but he was not so admitted in the lifetime of the said Samuel Neal, by reason of his service under the said articles of clerkship not having expired in the lifetime of the said Samuel Neal: and an assignment of the said articles of clerkship was after the death of the said Samuel Neal duly executed unto William Cox, of, &c., a solicitor of the Court of Chancery and an attorney of the Courts of Queen's Bench, Common Pleas, and Exchequer, for the purpose of the said William Neal completing his service under the said articles of clerkship, which he subsequently did.

"3. The said business of the said Samuel Neal was after his death carried on by the said William Cox for the benefit of the widow and family of the said William Neal; and I entered into the service of the said William Cox for the purpose of assisting him in the conducting and managing thereof for their benefit and until the said William Neal should be admitted as such solicitor and attorney, and in a situation to succeed to and carry on the same.

"4. The said William Neal was, after he completed \*his service under the said articles of clerkship and assignment, that is to [\*353 say, in the year 1858, admitted a solicitor of the High Court of

Chancery, and an attorney of the said Courts of Queen's Bench, Common Pleas, and Exchequer, and took to the said business so previously carried on by the said Samuel Neal in his lifetime, as also to the business of the said William Cox of an attorney and solicitor, and who is now a member of Parliament, and who recently ceased at his own request and by a rule of the Court of Queen's Bench to continue an attorney thereof.

"5. In consequence of my having entered into the service of and remained with the said William Cox, and my zeal and attention whilst in his service and assisting him in the conducting and managing of the said business of the said Samuel Neal after his death, for the benefit of his said widow and family, and until the said William Neal could be admitted as such solicitor and attorney, I was on the 11th of June, 1858, bound by certain articles of clerkship, duly executed and attested on unstamped paper, for a period of five years, to the said William Neal, with a view to my being admitted a solicitor of the said High Court of Chancery, and an attorney of the said Courts of Queen's Bench, Common Pleas, and Exchequer; and the said William Neal did at the time of the execution of the said last-mentioned articles of clerkship promise and agree to and with me that he the said William Neal would, before the time limited by law expired for paying of the proper duty on the said last-mentioned articles of clerkship, obtain the money necessarily required from his mother, the said widow and executrix of the said Samuel Neal, for the purpose of paying, and would duly pay with the same when so obtained, the proper duty thereon, and have the necessary stamp of such payment affixed on the \*354] said articles \*of clerkship by the Commissioners of Her Majesty's inland revenue.

"6. The sum of money necessary and requisite for the payment of the said duty on the said last-mentioned articles of clerkship was promised to be given to me by the said widow previous to the execution thereof, as an acknowledgment and recompense for services rendered by me to her and the family of the said Samuel Neal after his death, and for my having also after his death entered into the service of and remained with the said William Cox for the purpose of assisting him in the conducting and managing of the said business carried on by the said Samuel Neal in his lifetime, for the benefit of her and his family, and whereby large sums of money were derived for them.

"7. I entered into and executed the said articles of clerkship upon the express faith and understanding that the said William Neal would obtain the said money of his said mother, the said widow, as before stated, and duly pay the proper duty on the said articles of clerkship, and have the necessary stamp affixed thereon before the time allowed by law expired for such purpose.

"8. An affidavit of the due execution of the said articles of clerkship as required previous to the enrolment of articles of clerkship was on the 10th of December, 1858 (and within the time limited by law for so doing), made by Mr. James Neal, one of the attesting witnesses thereto, and who is brother to the said William Neal,—an office-copy of which was annexed.

"9. *I after the time allowed by law for stamping and enrolling the said articles of clerkship had expired, and not before, discovered that the proper*

*duty had not been paid* on the said last-mentioned articles of clerkship, and the same consequently not stamped and enrolled; upon which I complained to the said William Neal on the subject, and inquired of him the reason why the same had not been stamped; when he stated and informed me that he had within the time limited by law applied to and requested his said mother to hand him the money to pay the necessary and proper duty on the said last-mentioned articles of clerkship, which she declined doing, assigning her inability as a reason and excuse for then not paying the same, and which he would have done if he could have afforded it.

"10. I was not in a position to have paid the said duty on the said last-mentioned articles of clerkship at the time of the execution thereof, nor was it ever agreed or intended I should do so; and I was in hope, and believed, from various conversations I had with the said William Neal subsequent to my discovering that his said mother had not furnished him with the proper amount to pay the said duty on my said articles of clerkship that she would still have done so; and I never gave up or abandoned such hope or believed otherwise until the month of January last past, when I presented a petition, founded on the before-mentioned facts and circumstances, to Her Majesty's Chancellor of the Exchequer and the Lords Commissioners of Her Majesty's Treasury, praying to be at liberty to stamp the said last-mentioned articles of clerkship on payment of the proper duty and necessary penalty in that case made and provided,—a copy of which petition was annexed; and the said Chancellor of the Exchequer and the Lords Commissioners of Her Majesty's Treasury were pleased to order and direct the Commissioners of Her Majesty's inland revenue to stamp the said last-mentioned articles of clerkship on payment of the said proper duty and a penalty of 40*l.*: \*and I have since [\*356 paid to the said Commissioners of Her Majesty's inland revenue the said proper duty and the said penalty of 40*l.*, and had the necessary stamp denoting the payment of the same affixed thereon.

"11. The said last-mentioned articles of clerkship were afterwards, that is to say, on the 4th of March last past, duly enrolled by the proper officer of the Court of Queen's Bench, and have since been produced to the registrar of attorneys and solicitors, and duly entered by him in a book kept for that purpose pursuant to the statute in that case made and provided.

"12. I have ever since the execution of the said last-mentioned articles of clerkship been truly and faithfully, and am now truly and faithfully serving as a clerk under the same to the said William Neal, and in accordance with the provisions thereof, and in compliance with the statutes relative thereto.

"13. I am now in the forty-second year of my age, and have a wife and two children dependent on my exertions for support, and no part of the said duty or penalty was paid by the said William Neal or his mother, or any member of his family: and, had it not been for the assistance of friends to whom I at the commencement of this year made known my position relative to my said articles of clerkship, I could not have paid the said duty and penalty.

"14. I would never have executed the said articles of clerkship, if I had had any idea or belief that the said duty would not have been

duly paid by the said widow of the said Samuel Neal; and, believing that if the said duty was paid, with the said penalty of 40*l.* as directed by Her Majesty's said Chancellor of the Exchequer and the Lords Commissioners of Her Majesty's Treasury, I should obtain a rule of one of Her Majesty's Courts of common law at Westminster, directing \*857] my \*service to reckon and be computed from the date of the execution of my said articles of clerkship, and not from the time of the enrolment thereof, I strongly induced my said friends to assist me in paying the same."

The affidavit further stated, that, in Easter Term, 1862, a similar application was made to the Court of Queen's Bench, but without success.

The affidavit of Mr. Neal corroborated that of the applicant in all material particulars.

The question arises upon the 3d section of the 19 & 20 Vict. c. 81, which, after reciting, that, by the 7 G. 4, c. 44, it was enacted "that it shall not be lawful for the Commissioners of stamps or any of their officers to stamp, under any pretence whatever, after the expiration of six months from the date thereof, any vellum, parchment, or paper, upon which shall be engrossed, printed, or written, any articles of clerkship; contract, indenture, or other instrument whereby any person shall become bound to serve as clerk or apprentice, in order to his admission as a solicitor, attorney, proctor, writer to the signet, agent, or procurator in any of the Courts of law or equity, or the High Court of Admiralty, or any ecclesiastical Court, or the Courts of session, justiciary, Exchequer, commission of tiends, or the commissary Courts, or any inferior Court in Great Britain," enacts that "it shall be lawful for the Commissioners of inland revenue, notwithstanding the said last-mentioned Act, in any case where they shall be directed so to do by the Commissioners of Her Majesty's Treasury, to stamp any such instruments as last aforesaid, upon payment of the duty chargeable thereon at the date thereof, and of such further sum as hereinafter specified, by way of penalty, and in lieu of all other penalties, that is to say, as to any such instrument bearing date and executed before the 5th of August, \*1853, the sum of 20*l.*,—as to \*358] any other such instrument, where the same shall be brought to be stamped within the period of one year from the date thereof, the sum of 10*l.*,—after one year and within two years, 20*l.*,—after two years and within three years, 30*l.*,—after three years and within four years, 40*l.*,—after four years, 50*l.*" The Court of Queen's Bench, when this matter was before them, took, it is submitted, an erroneous view of the principle on which the decisions upon this statute were based. In *Ex parte Norton*, 26 Law J., Q. B. 24 (which is very like this case), the Court allowed articles of clerkship which had not been stamped within six months from their execution, but which had been subsequently stamped under the 19 & 20 Vict. c. 81, and under which the clerk had served from their execution, to be enrolled, and the service to count from the date of that execution,—it appearing that there had been no negligence or default on the part of the clerk. So, in *Ex parte Haud*, 5 W. R. 687, a clerk articulated in 1852, after the six months for the enrolment of articles had expired, discovered that they had not been stamped as they ought to have been by his master. In

1854, he entered into fresh articles, and paid the amount of stamp-duty. After the passing of the 19 & 20 Vict. c. 81, s. 3, upon payment of a penalty, the treasury allowed the first articles to be stamped, and the duty paid upon the subsequent articles to be returned. And upon these facts,—no blame being attributable to the clerk,—the first articles were allowed to be enrolled, and his service to be computed from their date. Again, in *Re Welch*, 5 W. R. 505, the Court of Queen's Bench allowed the service of a clerk to count from the execution of the articles, though they were not stamped until four years after,—it being shown to their satisfaction that there had been no intention to cause the service to be under unstamped articles, and \*that it was not the fault of the clerk himself,—*Erle, J.*, saying, “He served for four years under a void instrument. But [\*359 it is no fault of the applicant, and it will be hard upon him if he is not allowed to get the stamp affixed.” In *Ex parte Fenton*, 7 W. R. 160, a clerk was articled in 1842, to his father, who died in 1845. Three months after the death, it was discovered that the articles had never been stamped. The omission could not be accounted for; but it was not occasioned by any default on the part of the clerk, who, till the discovery referred to was made, believed them to have been stamped. In 1858, they were stamped under the 19 & 20 Vict. c. 81, s. 3; and the Court of Queen's Bench allowed the service to be computed from the date of the execution of the articles. In *Ex parte Williams*, 5 W. R. 376, *Erle, J.*, says: “The provisions of the 6 & 7 Vict. c. 73, ss. 8, 9, and 7 & 8 Vict. c. 86, s. 2, above mentioned, giving a discretion in respect of the time the service is to date from, and those of the 19 & 20 Vict. c. 81, s. 3, above mentioned, giving a discretion in respect of stamping, are directed to relieve clerks from suffering unduly from the negligence of others to whom they from their age and position have been obliged to intrust the stamping and enrolling of their articles. If the clerk has done all that lay in him to do for this purpose, and those whom he was obliged to trust have failed in their duty, he ought to be relieved, provided he can bring himself within the principle for granting exceptional relief from a general rule. These statutes neither in word nor intention justify the notion that a clerk has a right to treat the requirement of the stamp upon articles as repealed, unless he comes to be admitted, and then qualifies by paying what may be due both for the stamp and the penalty: the law requiring the stamp remains as before, subject to a discretionary power of \*relaxation in certain exceptional cases.” [\*360 Where the omission to stamp the articles was *intentional*, the indulgence now sought has been refused: see *In re Welch*, 6 W. R. 64, where *Crompton, J.*, says: “The result of the statement made in the affidavit, is, that a year or more is allowed to elapse before the articles are stamped, in order that the father of the applicant may ascertain whether his son's health will improve and render him fit for the profession. To allow the articles under such circumstances to date back, and the service to be reckoned from the date of the articles, would not be a proper exercise of discretion. It appears from the facts in this case that it is one of hardship; but I cannot introduce a practice of giving relief under such circumstances.” In *Ex parte Herbert*, 31 Law J., Q. B. 33, H. entered into articles of clerkship as an attor-

ney with his father, and duly served his clerkship for the five years from their execution. H. did not know till nearly the end of his time that it was necessary that the articles should be stamped and enrolled. After his service was out, they were handed to him by his father, who had always kept possession of them, and, being unstamped, on application to the Lords of the Treasury, they permitted them to be stamped on payment of 50*l.* penalty, pursuant to the 19 & 20 Vict. c. 81, s. 3. The father made affidavit that he omitted to have the articles stamped and enrolled within six months of the execution, from his being "wholly without the means of paying the stamp-duty, and because he thought that under the above section they could be afterwards stamped on the payment of a penalty; that he had no preconceived plan to article his son speculatively, but solely with the intention of ultimately stamping and enrolling the articles." Under the circumstances the Court,—on the authority of *Ex parte Bishop*, 9 C. B. 150 (E. C. \*361] L. R. vol. 67),—allowed the articles to be \*enrolled and the service under them to be computed from the date of their execution; Crompton, J., dissenting. Cockburn, C. J., in his judgment, hits the true principle by which these cases should be governed. "The Court," he says, "has always been ready to interfere for the protection of the revenue: but, under this recent Act, the revenue can interfere and protect itself; and, if the Lords of the Treasury, after inquiry, think fit to allow the articles to be stamped, we ought to assume that they are the best judges of what is essential for the best interests of the revenue." And Wightman, J., says: "The Courts formerly had to protect the revenue when articles were not duly stamped. By the 19 & 20 Vict. c. 81, s. 3, the difficulty is obviated by the power which the treasury has given to it to order, at its discretion, instruments to be stamped after the six months, on payment of certain penalties. It may be, if the treasury were of opinion that the loss was not obviated by the penalty of 50*l.*, they would not interfere: but, whether it be for the loss or gain of the revenue, they are the best judges; and, they having decided to allow the articles to be stamped, I do not see why this Court should interfere." The objects aimed at by the legislature in all the Acts for the regulation of attorneys, are, the protection of the revenue, and the securing honest and skilful practitioners." Crompton, J., in delivering the judgment of the Court of Queen's Bench in this matter (31 Law J., Q. B. 184), says: "The statutes (6 & 7 Vict. c. 73, ss. 8, 9, and 7 & 8 Vict. c. 86, ss. 1, 2, 3), make an application to the Court necessary for the purpose of reckoning the service previous to the enrolment; and this has always been considered as still necessary since the passing of the 19 & 20 Vict. c. 81, s. 3, which allows the affixing of the stamp after \*362] the expiration of six months from the date of the articles, \*at the discretion of the Commissioners of the Treasury, which could not previously be done.(a) In all the cases which have occurred since this discretion was given to the Commissioners of the Treasury, the principle on which the Court has always acted, is, to consider whether there has been any mistake in the matter, as to which the clerk was not to blame; and, if it appeared that the applicant had been led to suppose that he had been serving under articles which were

(a) See 7 G. 4, c. 44, s. 4.

properly stamped and enrolled, and with regard to which the other requisites had been properly performed, the Court has granted the application, so that the party might not be prejudiced in a case in which he had naturally supposed that he was serving under proper articles. But, in the present case, the clerk knew almost from the commencement of his service that he was not serving under valid articles, and he could not have made any mistake about it, except for the first few months. If we were to grant this application, and allow the service to date back, we should have to do so in all cases in which the Commissioners have thought proper to allow the stamp to be affixed: in effect, we must say that our functions are to cease, and in every case that we are to be governed by the discretion of the Lords of the Treasury." That, it is submitted, is far too narrow a view of the duty of the Court.

ERLE, C. J.—We will speak to the other Judges before we dispose of this application.

*Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court:—

In this case, the Court of Queen's Bench refused to \*allow the affidavit of the execution of the articles to be enrolled [\*368 nunc pro tunc, and the service to count from the date of the articles, after reading the affidavits then before that Court: and we beg leave to say that we concur in the reasons for the refusal, as expressed by my Brother Crompton: see 81 Law J., Q. B. 184.

The legislature has required the Courts to see that many conditions intended to secure skill and respectability in attorneys have been complied with, among others, indirectly, that the stamp duty on the articles of clerkship has been paid. As to this payment, the treasury has a direct duty in respect of the revenue; but, beyond that, the Judges have a duty to see either that the money has been paid in due time, or the delay accounted for, before they allow the enrolment, and order the service to count as above mentioned.

In this case, the applicant in the Queen's Bench accounted for the omission because he relied on a promise that the money would be paid for him, and had gone on with the service in the hope that the promise would be performed. As a general rule, this could not be accepted as sufficient. But the further affidavits show that the applicant has been deprived of the money which was fairly his right, by an emergency which we may most justly infer was entirely unforeseen by him.

He had been the managing clerk for an attorney who died leaving a widow and a young son who could not take up the business and carry it on. He gave his services to them and their friend to keep that business together, and has succeeded in doing so. The son, as soon as he was admitted an attorney, gave him his articles; and the widow promised to pay the stamp duty; and so he became bound to the son. He has thus been obliged to continue in the service: and \*he states that he was in constant belief that the widow would perform her promise. When that belief failed, he obtained [\*364 the money for himself near two years before the term of service expired, and satisfied the claim of the treasury, and now makes this application.

He is stated to be thoroughly competent; and, being of the age of C. B. N. S., VOL. XII.—15

forty-two, delay is of worse consequence than it would be to a younger man.

Some of these facts were not before the Judges of the Court of Queen's Bench. We have conferred with them since; and, under the circumstances above stated, that Court concurs with us, and we now grant the application. Rule granted.

### HAYWARD and Another v. DUFF. May 9.

The defendant having been arrested on a ca. sa. after the plaintiff had proved his debt under a fiat against him, applied by summons for his discharge, and to set aside the ca. sa. The Judge made the order, imposing as a term *that the defendant should bring no action*. Having availed himself of the order so as to obtain his discharge,—Held, that the defendant could not afterwards move to set aside so much of it as restrained him from bringing an action.

THE plaintiffs having recovered a judgment against the defendant, the latter became bankrupt, and the plaintiffs proved their debt under the fiat, and one of them was chosen trade assignee. The bankrupt failing to come up to pass his examination, the proceedings were adjourned sine die, without protection. The plaintiffs then issued a ca. sa. upon their judgment, and took the defendant in execution. The defendant applied to the Commissioner to discharge him from custody. The Commissioner declining to interfere, an application was made to Byles, J., at Chambers, who, upon hearing the parties, made an order that the ca. sa. be set aside, and the defendant discharged \*865] from custody, and that *no action should be brought against any party*. The defendant drew up the order, and was discharged; but he did not serve the order on the plaintiffs. Eight days after his discharge from custody, the defendant brought an action against the plaintiffs and their attorney for the wrongful arrest. A summons was thereupon taken out to stay the proceedings in that action. The summons was transferred to Byles, J., and he made an order for a stay of proceedings.

Daly, on a former day in this term, obtained a rule nisi to set aside so much of the first order of Byles, J., as directed that no action should be brought. He referred to the 182d section (a) of the Bank-rupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), and \*366] submitted that the learned Judge had no power to impose the terms he did.

(a) Which enacts that "no creditor who has brought any action or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the bankruptcy, shall prove a debt under such bankruptcy, or have any claim entered upon the proceedings, without relinquishing such action or suit, and the proving or claiming a debt under a fiat or petition for adjudication of bankruptcy by any creditor shall be deemed an election by such creditor to take the benefit of such fiat or petition with respect to the debt so proved or claimed: provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him, and that, where any such creditor shall have brought any action or suit against such bankrupt jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect such action or suit against such other person or persons; provided also that any creditor who shall have so proved or claimed, if the fiat or petition for adjudication be afterwards suspended or dismissed, may proceed in the action as if he had not so proved or claimed;" &c.

*Merewether* now showed cause.—The learned Judge had full authority to impose the terms he did. In *Lorimer v. Lule*, 1 Chitt. R. 134, the Court say: "When a defendant applies to us to set aside proceedings for irregularity, we have a discretionary power of imposing upon him just and equitable terms as a condition or qualification of our interference; and we shall not suffer a party so applying to prosecute an action of trespass merely on account of such a slip in practical accuracy. When a case of malicious issuing or undue execution of process is laid before us, we will impose no such restraint; but this is not a case of that description." And in *Wentworth v. Bullen*, 9 B. & C. 840, 850, Parke, J., says, that "the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a Judge." And he further says that the absence of the words "by consent" makes no difference. If the party takes a benefit under the order, everything upon the face of it must be presumed to have been consented to. The learned Judge here would not have set aside the *ca. sa.* without imposing terms. [BYLES, J.—I was under an impression that the defendant was asking more than he was entitled to, as to the *ca. sa.*, and so put him under terms.]

*Daly*, in support of the rule.—*Lorimer v. Lule* was a case of mere irregularity; the judgment having been signed after an appearance entered. This, however, is more than an irregularity. [ERLE, C. J.—Having taken the benefit, must you not take the burthen also?] The defendant only took advantage of the order to the limited extent to which he was entitled *ex debito justitiæ*. [KEATING, J.—The summons sought to set aside the *ca. sa.*] The defendant's [\*367 asking too much could not give the Judge a jurisdiction which he had not.

ERLE, C. J.—I uniformly hold that that which parties accept from me at Chambers they accept in whole. I decide between the parties. One who acts upon an order in any way adopts the whole of it.

WILLES, J.—I find an express decision upon the point in *Pierce v. Chaplin*, 9 Q. B. 802 (E. C. L. R. vol. 67). There, on motion at Chambers to set aside a judgment and execution for irregularity, on the alleged ground that the judgment had been signed pending a summons for time to plead, which summons the plaintiff's attorney denied having received, the Judge made an order setting aside the judgment and execution without costs, but not embodying any decision as to the irregularity; and he added a direction that the defendant should bring no action. The defendant protested against this addition, but served the order upon the sheriff, who thereupon gave up the goods. And it was held that the defendant, having thus far availed himself of the order, could not apply to the Court to rescind that part of it which forbade the bringing an action. This rule must be discharged.

ERLE, C. J.—And with costs.

The rest of the Court concurring, Rule discharged with costs.

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\*LEE v. EVANS. May 13.

The Court will not grant a new trial (before the sheriff) where the sum sought to be recovered is less than 5*l.*, merely because the question involved is one of importance to the plaintiff.

THIS was an action by a sack contractor for the hire of sacks, and demurrage for their detention. The sum sought to be recovered was 3*l.* 19*s.* 9*d.*

At the trial before the undersheriff of Derbyshire, in order to make out his claim, the plaintiff called one William Beck, the station-master at Rowsley. He had, however, omitted to bring his books. They had been sent for, but had not arrived until after the summing up, when they were tendered, but the undersheriff declined to receive them, and consequently there was a verdict for the defendant.

*H. James*, on a former day in this term, upon affidavits verifying the undersheriff's notes, and detailing what took place at the trial, obtained a rule nisi for a new trial "on the ground that the books tendered in evidence should have been received, and that there was a miscarriage at the trial on account of their not having been shown to the jury."

*Stephens* now showed cause.—A new trial is never granted in cases before a sheriff, where the sum in dispute is under 5*l.*, unless the decision involves some matter of right, or where the verdict on the former trial passed under such circumstances as would justify the Court in granting the application without costs. None of these circumstances occur in the present case. The whole matter in contest is, whether or not the plaintiff is entitled to recover 3*l.* 19*s.* 9*d.* "The principle of the rule," said the Court of Exchequer, in *Bryan v. Phillips*, 3 Tyrwh. 181, 1 C. & M. 26,† which was a case tried at the assizes, "is, \*369] that if there be no \*misdirection, the party would have to pay costs; and that would not be worth while in cases under 20*l.* The Courts make it a rule not to grant a new trial when the verdict is for less than 20*l.*, unless in a case where they can grant it without costs." A new trial in this case could decide nothing but the question whether the plaintiff is entitled to recover this small amount of damages; and it can only be on payment of costs, for, there has been no miscarriage on the part of the Judge. If the plaintiff was not prepared to try at the proper time, he might have withdrawn the record, or submitted to a nonsuit. Instead of adopting either of those courses, he thought fit to take his chance of a verdict upon the evidence he then had.

*H. James*, in support of the rule.—The verdict passed for the defendant only by reason of the absence of the books. This being a writ of trial, which must be returned on a certain day, the plaintiff could not withdraw the record, as suggested. [ERLE, C. J.—He might have been nonsuited.] All the expense of going down to trial had then been incurred. [BYLES, J.—Are you right in saying that the record cannot be withdrawn in such a case as this? This Court held the reverse in *Shaw v. Owen*, 17 C. B. 524 (E. C. L. R. vol. 84).] In effect, that is what the plaintiff is now seeking to do. The rule that a new trial will not be granted in cases before the sheriff, where the verdict or the sum sought to be recovered is below 5*l.*, is not

inflexible. It is departed from where the jury were misdirected,—*Haine v. Davey*, 4 Ad. & E. 892 (E. C. L. R. vol. 31), 6 N. & M. 356 (E. C. L. R. vol. 36): and so, it is submitted, it ought to be, where, as here, although the sum to be recovered by the action is small, the principle involved is one of great commercial importance.(a)

\*ERLE, C. J.—I am of opinion that this rule should be discharged, on the grounds urged by Mr. *Stephens*. The cause [370] was properly tried. The plaintiff chose to go on with the materials which he had, instead of withdrawing the record, as it seems he might have done, or submitting to a nonsuit. All that could have been recovered, if the plaintiff had succeeded, was 3*l.* 19*s.* 9*d.*; and in no event could he have a new trial without the payment of costs, which necessarily must be a great deal more. I think it is a wise rule of law. This rule must be discharged with costs.

BYLES, J.(b)—I am of the same opinion. *Haine v. Davey* was a case of misdirection, to which the rule referred to does not apply. There has been no miscarriage on the part of the Judge here: a new trial, therefore, could only be granted, if granted at all, upon affidavit, which implies payment of costs. The rule that a new trial shall not be granted in the case of a verdict under 5*l.*, is a merciful one to the parties, seeing that it must necessarily cost more to grant it.

KEATING, J., concurred.

Rule discharged.

(a) See *Williams v. Evans*, 2 M. & W. 220.†

(b) *Willes, J.*, was engaged in the Probate Court.

\*ANDREWS and Others v. MARTIN. May 13. [371]

Where a defendant had been taken on a ca. sa. as he was leaving the Insolvent Debtors Court, his petition having been adjourned sine die, without protection,—the Court refused to discharge him without his undertaking to bring no action against the sheriff.

And, held, that the fact of his having delayed his application for six months was no objection.

On the 24th of August, 1861, the defendant petitioned the Insolvent Debtors Court for relief, when he obtained an interim order of protection. On the day appointed for the hearing, viz. on the 20th of November, the defendant attended at the Insolvent Debtors Court, when he was examined, and his case adjourned sine die, without protection.

As the defendant was leaving the Insolvent Court to proceed to his residence in Beaufort Buildings, Strand, and just as he reached the outside of the court, he was arrested by an officer of the sheriff of Middlesex, on a ca. sa. upon a judgment at the suit of the plaintiffs, and taken to the White Cross Street prison. The affidavits showed that the arrest had taken place under very aggravated circumstances.

On the 5th of May, 1862, the defendant applied to Williams, J., at Chambers, to discharge him from custody on the ground of privilege. The learned Judge offered to make an order, provided the defendant would undertake to bring no action. The defendant declined to take the order upon those terms.

*Shaw*, on a former day in this term, obtained a rule nisi to the same

effect. He submitted that the defendant, being clearly privileged was entitled to an unconditional discharge. He cited *Chauvain v. Alexandre*, 31 Law J., Q. B. 79, where the privilege was held to apply to one attending the Insolvent Debtors Court upon his own petition.

*Pearce*, who appeared to show cause, was willing to consent to the \*372] defendant's discharge, upon the terms \*of his bringing no action: and he submitted that the defendant had waived his privilege by remaining in the court for half an hour after the Court had risen; and further that the application was too late, nearly six months having elapsed before the first summons was taken out [*KEATING, J.*, referred to *Lightfoot v. Cameron*, 2 W. Bl. 1113, where the party was held not to have lost his privilege by having gone with his attorney and witnesses, after the rising of the Court, to dine at a tavern in New Palace Yard. *WILLES, J.*—The delay is nothing(a) He was in time so long as he might have sued out a writ of privilege.]

*Shaw*, in support of his rule, submitted that he was entitled to have the rule made absolute without the imposition of any terms.

*ERLE, C. J.*—You cannot sue the sheriff; and we do not interfere with any remedy which you may have against any one else. The rule must be absolute.

The rule was drawn up as follows,—“It is ordered that the defendant be forthwith discharged, &c., on the ground that the said defendant was temporarily privileged at the time of his arrest,—the defendant by his counsel hereby undertaking not to bring any action or take any proceedings against the said sheriff for or on account of the said arrest.”

(a) See *Webb v. Taylor*, 1 D. & L. 676.

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\*STAGG v. ELLIOTT. May 8.

Where a bill upon the face of it purports to be accepted “per procuration,” that circumstance is a notice to whoever takes the bill that the acceptor has but a limited authority; and the holder cannot maintain an action against the principal if the authority has been exceeded.

THIS was an action upon a bill of exchange drawn by one Edward Bradley upon the defendant, William Elliott, and accepted by the defendant “per pro.” George Elliott, and endorsed by Bradley to the plaintiff.

The defendant by his pleas denied the acceptance and endorsement, as alleged; whereupon issue was joined.

The cause was tried before *Erle, C. J.*, at the sittings in London after the last term. The plaintiff, it appeared, was a linen-draper carrying on business in the Newington Causeway, in the county of Surrey. The defendant was a straw-hat manufacturer at Luton and Dunstable, in the county of Bedford. The bill upon which the action was brought was in the following form:—

"No. 157. £84 7s. 0d.

"Two months after date, pay to shillings, value received.

"To Mr. WILLIAM ELLIOTT."

"At Bradley & Co.'s  
per pro. William Elliott,  
GEORGE ELLIOTT."

"London, Nov. 16th, 1860.

my order eighty-four pounds, seven

EDWARD BRADLEY."

It was proved that George Elliott was the son of William Elliott, the defendant; and that, at the time the acceptance in question was given, he was managing the defendant's business at Luton. It was further proved that the defendant had frequently bought goods of Bradley for the use of the establishments both at Luton and at Dunstable; and that Bradley was in the habit of drawing for the moneys due to him upon the defendant, and that such drafts were frequently \*accepted by George Elliott, the son, in the same manner as the [\*374 bill now in question, and that such bills had been paid by the defendant: and it was not disputed that George Elliott had authority to bind the defendant by accepting bills on account of the Luton business.

A bill for the same amount, and drawn and accepted in the same form, became due on the 13th of November, 1860, and was paid: and nothing remained due from the defendant to Bradley at that time: on the contrary, the balance was the other way.

On behalf of the defendant, it was contended,—first, that the acceptance was a forgery; and as to this there was a great deal of conflicting evidence,—secondly, that, if the acceptance was genuine, George Elliott had no authority to accept this particular bill, and that the form of the acceptance cast upon the person receiving it the duty of ascertaining the extent of George Elliott's authority to bind his father.

The jury having retained a verdict for the plaintiff for the amount of the bill and interest,

*Shee*, Serjt., on a former day in this term, on the authority of *Alexander v. Mackenzie*, 6 C. B. 766 (E. C. L. R. vol. 60), obtained a rule nisi for a new trial, on the ground that the onus of showing that the son was authorized to bind his father by the particular bill lay upon the plaintiff. He also moved upon the evidence; but on this the rule was refused.

*Ballantine*, Serjt., and *Henry James* now showed cause.—The general right in George Elliott to accept bills by procuracy was admitted. [WILLES, J.—Those bills which he was authorized to accept.] Assuming that this bill was not accepted by the son for business purposes, and that that fact was known to the original \*taker, [\*375 Bradley, still, as the present plaintiff took the bill *bonâ fide*, and in ignorance of any irregularity, his title to sue is perfect. It would be a most dangerous doctrine to introduce, to hold that inquiry must be made into the authority in every case where the acceptance is by procuracy. It is true that this Court held, in *Alexander v. Mackenzie*, that the acceptance or endorsement of a bill of exchange expressed to be "per procuracy," is a notice to the endorsee that the party so accepting or endorsing professes to act under an authority from some principal, and imposes upon the endorsee the duty of as-

certaining that the party so accepting or endorsing is acting within the scope of such authority. But that case underwent consideration in an elaborate judgment in the Exchequer, in a case of *Smith v. M'Guire*, 3 Hurlst. & N. 554,† where it is laid down, that, where a person permits another to act as his *general agent*, he is bound by a contract made by the agent, although the latter declares himself as acting "by procuration," and has received special instructions, which he exceeds. There, the defendant, who formerly carried on the business of a corn-merchant at Limerick, came to reside in London, and left his brother Martin to conduct his business in Limerick. The defendant's name remained over the door. For the space of three years, Martin purchased large quantities of oats, and chartered numerous ships on account of the defendant. On these occasions, the defendant usually sent him special instructions. In the year 1858, a ship in the port of Limerick being about to proceed to Quebec for a cargo of timber, Martin chartered her to carry, on her return from Quebec, a cargo of oats to London. He signed the charter-party "per procuration." In an action against the defendant for not loading a cargo

\*376] pursuant to the charter-party,—it was held that it was "properly left to the jury to say whether the defendant had allowed Martin to act as his *general agent*, and, if so, he was liable, although Martin might have exceeded his authority. Pollock, C. B., there says: "The expression 'per procuration' does not always necessarily mean that the act is done under procuration. All that it in reality means is this, 'I am an agent, not having any authority of my own.' *Alexander v. Mackenzie* was chiefly founded on the case of *Attwood v. Munnings*, 7 B. & C. 278 (E. C. L. R. vol. 14), 1 M. & R. 66 (E. C. L. R. vol. 17), where the agent was the defendant's wife, and no doubt the authority was quite special. It was not the authority which a tradesman gives to his shopman to sell goods during his absence, and possibly carry on his trade while he is abroad: but it was a particular authority to perform certain acts for certain specified objects: and so the Court (particularly Holroyd, J.) expressed itself with reference to these circumstances." "In *Attwood v. Munnings*, Littledale, J., said: 'It is said that third persons are not bound to inquire into the making of a bill; but that is not so where the acceptance appears to be by procuration.' Therefore, if a person for the first time meets with a bill accepted 'per procuration,' and chooses to take it without making any inquiry, the loss will fall on him, if the acceptor had no authority. But the practical questions are,—what is the extent of inquiry which ought to be made? and what answers may be deemed satisfactory, so as to protect from loss, though it should turn out that the authority has been exceeded? It is true, that, if a bill is accepted by A. on behalf of B., and it is known that B. has accepted bills for A., many persons would take it for granted that there was neither forgery nor fraud in the matter, and that they might safely take it: but, if the law is complied with, and an inquiry made, to what extent is it to go? I think that the holder is not

\*377] bound to go to the acceptor and say, 'Have you a power of attorney or other authority to accept this bill?' *When he has ascertained that the person who has accepted the bill as agent or by procuration, as a clerk in the house and, in the course of his employment, has*

*from day to day accepted bills of that sort, that is enough; and he need not ask for his power of attorney or authority, nor whether that particular bill is on account of the firm.*" In *Alexander v. Mackenzie*, Coltman, J., says: "If this banking Company had been in the habit of allowing their cashier or manager to endorse bills on their behalf, that would have imported a general authority, and the public would not have been bound to inquire into the circumstances or the precise extent of such liability." [ERLE, C. J.—*Smith v. M'Guire* is a very peculiar case. WILLES, J.—Where there is a *general* authority, the question cannot arise.] It is submitted that a general authority was proved here. [BYLES, J.—A general authority to accept bills for the principal.] The same question precisely is raised here that arose in *Smith v. M'Guire*. If inquiry had been made there, the authority would have been repudiated. It is difficult to discover any substantial distinction between that case and the present. In *Prescott v. Flinn*, 9 Bingh. 19 (E. C. L. R. vol. 23), 2 M. & Scott. 18 (E. C. L. R. vol. 28), from the fact that the defendants' confidential clerk had been accustomed to draw checks for them; that, in one instance, at least, they had authorized him to endorse; and that, in two other instances, they had received money obtained by his endorsing in their name,—a jury was held warranted in inferring that the clerk had a general authority to endorse. [WILLES, J.—In *Grant v. Norway*, 10 C. B. 665 (E. C. L. R. vol. 70),—where the question was whether the master of a ship signing a bill of lading for goods which have never been shipped, was to be considered as the agent of the owner in that behalf, so as [\*378 to make the latter responsible to one who has made advances upon the faith of bills of lading so signed,—Jervis, C. J., says: "If, from the usage of trade, and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority, and, in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped. It would resemble the case of goods or money taken up by the master under pretence that they were wanted for the ship, when in fact they were not; or a bill of exchange accepted or endorsed per procuration, when no such agency existed: *Alexander v. Mackenzie*. The words 'per procuration' give notice to all persons that the agent is acting under a special and limited authority; and therefore the party taking such a bill has to establish the existence of the authority: it is not enough to show that other bills similarly accepted or endorsed have been paid, although such evidence, if the acceptance were general, by an agent in the name of the principal, would be evidence of a general authority to accept in the name of the principal." All the cases show, that, where the general authority is proved to exist either in terms or by repeated instances of its exercise, the principal is bound, whether on the face of the instrument the party appears to be acting by procuration or not. In *Alexander v. Mackenzie*, it was left to the jury to say whether Bleckley (the endorser) had a general authority to draw, accept, and endorse bills on account of the bank, and whether he endorsed the bill in question by authority of the bank: and the jury must have found both alterna-

tives against the plaintiff. The distinction taken by Dr. Story (Story \*379] on Agency, § 126) \*between the case of a general agent and that of a special agent,—“the former being appointed to act in his principal’s affairs generally, and the latter to act concerning some particular object,” is this,—“in the former case, the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances. In the latter case, if the agent exceeds the special and limited authority conferred on him, the principal is not bound by his acts; but they become mere nullities, so far as he is concerned; unless, indeed, he has held him out as possessing a more enlarged authority.”(a) In Smith’s Mercantile Law, 5th edit. 134, it is said, that, when the authority of the agent “is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent as well as of its existence; and, in solving all questions on this subject, the general rule is, that the extent of the agent’s authority is (as between his principal and third parties) to be measured by the extent of his usual employment; for, he who accredits another by employing him, must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the seeming course of that employment, and on the faith of that credit, whether the employer intended to authorize them or not: since, where one of two innocent persons must suffer by the fraud of a third, he who enabled the third person to commit the fraud should be the sufferer.” [BYLES, J.—At p. 265, it is said, that, “where any of the \*380] signatures through \*which the holder (of a bill of exchange) claims are by procuration, the party paying must ascertain the sufficiency of the procuration at his peril.”] It is said that a party receiving a bill accepted or endorsed “per procuration” is bound to inquire. How is the inquiry to be made? If by letter addressed to William Elliott at Luton, the answer would of course come from George Elliott, he being the person having the general management of the business there. *Alexander v. Mackenzie* must, it is submitted, be considered as overruled by *Smith v. M’Guire*. [ERLE, C. J.—I do not think the Court of Exchequer intended to overrule that case.]

*Shee*, Serjt., *M. Smith*, Q. C., and *Gray*, in support of the rule.—There is a distinct judgment of this Court in *Alexander v. Mackenzie* in favour of the defendant, preceded by an equally distinct judgment of the Court of Queen’s Bench in *Attwood v. Munnings*, both of which cases are utterly undistinguishable from the present. The case relied on for the plaintiff,—*Smith v. M’Guire*,—clearly could not have been intended to overrule those two authorities; for, both *Martin, B.*, and *Watson, B.*, distinctly say that *Alexander v. Mackenzie* was well decided.

ERLE, C. J.—I am of opinion that my Brother *Shee* is entitled to have his rule made absolute. It seems to me that an acceptance in this form is one which the party discounting it takes at his own peril, as is stated in *Smith’s Mercantile Law*, 5th edit. 264. The cases of *Attwood v. Munnings* and *Alexander v. Mackenzie* are distinct autho-

(a) And see to the same effect *Paley Pr. & A.*, 3d edit. 198-202.

rities for this position. *Grant v. Norway*, 10 C. B. 665 (E. C. L. R. vol. 70), is strong to the same effect. Where the bill, upon the face of it, purports to be accepted "per procuration," that is a notice to all the world \*that the person who accepted it has but a limited [\*381 authority, and whoever takes it does so at his own peril. Here, it is perfectly clear that George Elliott, the agent, had no authority to bind his father, the principal, by his acceptance of any other than trade bills. I was wrong in not giving effect to the objection. There must, therefore, be a new trial.

WILLES, J.—I am of the same opinion. It is enough on the present occasion to say that the finding of the jury that the handwriting of the acceptance was the handwriting of George Elliott, was not enough to entitle the plaintiff to the verdict.

BYLES, J.—I am of the same opinion. The words "per procuration" are an express statement that the party accepting the bill has only a special and limited authority, and therefore a person who takes a bill so accepted is bound at his peril to inquire into the extent and nature of the agent's authority. It is not enough to show that other bills similarly accepted or endorsed have been paid, although such evidence, if the acceptance were general, by an agent in the name of a principal, would be evidence of a general authority to accept in the name of the principal. It was so decided by this Court in *Alexander v. Mackenzie*, 6 C. B. 766 (E. C. L. R. vol. 60), and also by Jervis, C. J., in *Grant v. Norway*, 10 C. B. 665 (E. C. L. R. vol. 70). It had before been decided by the Court of Queen's Bench in *Attwood v. Munnings*, 7 B. & C. 278 (E. C. L. R. vol. 14), 1 M. & R. 66 (E. C. L. R. vol. 17). So also is the law laid down in Bayley on Bills, 6th edit., p. 82, in Smith's Mercantile Law, 5th edit., p. 265, and in Story on Agency, § 92. And, though it is difficult to reconcile the rule with all that is said in *Smith v. M'Guire*, 3 Hurlst. & N. 554,† yet two of the learned Judges who took part in that decision expressly recognise *Attwood v. Munnings*. The result of the decisions \*seems to be this, that the way in [\*382 which this bill was accepted is the legitimate way of showing the fact that the acceptor has only a special and limited authority. Further, it is to be observed, that this rule depends upon the law-merchant, which extends over Europe and America; and this is the way in which it is understood all over the world. I think, therefore, we are bound to adhere to the rule as laid down by the Court of King's Bench in *Attwood v. Munnings* and by this Court in *Alexander v. Mackenzie*.

KEATING, J.—I am of the same opinion. The point having been made at *Nisi Prius* and overruled, there must be a new trial. Our judgment must not be understood as at all interfering with the decision of the Court of Exchequer in *Smith v. M'Guire*, which does not necessarily conflict with the cases here. Rule absolute.

*Ballantine*, Serjt., asked leave to appeal,—the more especially as the Lord Chief Justice had at the trial intimated an opinion adverse to the objection.

ERLE, C. J.—Considering the way in which the objection was presented, that can hardly be called an expression of opinion.

BYLES, J.—There are no less than three decisions against the plaintiff.

WILLES, J.—Smith v. M'Guire stands entirely upon its own grounds. There was evidence enough there to establish the fact that Mr. Martin M'Guire was left in Limerick to conduct the business in the same way that the defendant himself had done. The mere form in which the charter-party was signed makes no difference. I think the jury were quite right in this case. Leave to appeal refused.

# CASES

ARGUED AND DETERMINED

IN

## THE COURT OF COMMON PLEAS,

IN

Trinity Term,

IN THE

TWENTY-FIFTH YEAR OF THE REIGN OF VICTORIA. 1862.

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The Judges who usually sat in banco in this Term, were,—  
ERLE, C. J., WILLES, J., and  
WILLIAMS, J., BYLES, J.

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WHITE v. STEELE and Another. June 11.

The only legitimate way in which a parish can express its desire to do an act, is, by convening a vestry, and duly conducting the proceedings therein to their legal termination,—viz. show of hands, or by a poll when a poll is duly demanded.

A meeting of vestry was held for the purpose of considering the propriety of purchasing additional burial-ground for the parish of P. A resolution to that effect having been put, agreed to by the majority of those present, a poll was demanded, and refused. The resolution of the vestry was communicated to the Church Building Commissioners, who thereupon required the parish to purchase the land and to levy rates to defray expenses, under the 59 Geo. 3, s. 25, and 3 G. 4, c. 72, s. 26. Money was accordingly borrowed by the churchwardens and a rate made. A parishioner declining to pay the rate, on the ground of invalidity of the churchwardens' institution against him a suit in the Consistory Court, in which suit the defendant tendered a responsive allegation, stating that at the vestry a poll had been duly demanded and refused. The Judge of the Consistory Court having declined to admit this responsive allegation, the respondent appealed to the Court of Arches, by which Court the decision of the Consistory Court below was confirmed.

Upon an application to this Court for a writ of prohibition, on the ground that the Consistory Court had improperly refused to receive the responsive allegation, the defendant was directed to declare in prohibition; and, he having so done,—Held, that there was no legal expression of the desire of the parish, and consequently that the responsive allegation ought to have been admitted to proof in the Ecclesiastical Court.

An appeal from the Consistory Court to the Court of Arches is no bar to an application for prohibition.

A. WILLS, on behalf of George White, in Trinity Term, obtained a rule calling upon Alexander Steele and William Williams, churchwardens of the parish of Plumstead, in the County of Kent, to show cause why a writ of prohibition should not be granted against them.

issue to the Judge of the Arches Court of Canterbury, to prohibit him from further entertaining, and the said churchwardens from further prosecuting the suit for subtraction of church-rate then pending before the said Court, in which the said churchwardens were the original promoters and the said George White was the original defendant, on the ground that the said Judge, in refusing to admit the responsive allegation of the defendant, put a wrong construction on the statute law, and especially on the statute 3 G. 4, c. 72, s. 26,—notice being given to the Judge of the said Arches Court of Canterbury.

The circumstances disclosed by the affidavits were in substance as follows:—At a vestry meeting of the parish of Plumstead, held on the 9th of January, 1860, a resolution was passed that the churchwardens should purchase on behalf of the parish a piece of ground as an addition to the existing churchyard. A certain number of the vestry, who were desirous, instead of proceeding under the Church Building Acts, to proceed under the Burial Acts, whereby a cemetery might be obtained, partly consecrated and partly unconsecrated, for the general use of all the inhabitants, dissenters as well as members of the established church, demanded a poll, which the vicar (who presided) refused. The resolution of the vestry was communicated to the Church Building Commissioners, who thereupon authorized the parish to purchase the land and to levy rates to defray the expense. A sum of 1000*l.* was thereupon borrowed, and the land purchased, and the rate now in question was afterwards made for the repayment of such loan. The now plaintiff refusing to pay the rate, on the ground of invalidity, the churchwardens instituted against him a suit in the Consistory Court of London for subtraction of church-rate. The \*385] plaintiff claimed \*to put in a responsive allegation in that suit, to the effect that, a poll having been duly demanded and been refused, the parish had never legally expressed its desire to procure a burial-ground, under the statute 3 G. 4, c. 72, s. 26; (a) and, consequently, that the order of the Church Building Commissioners, and all proceedings based upon it, including the rate in question, were illegal. The Judge of the Consistory Court (Dr. Twiss) rejected the

(a) Which enacts “that it shall be lawful for the said Commissioners (the Ecclesiastical Commissioners) to authorize and empower any parish, chapelry, township, or extra-parochial place which shall be desirous of procuring a burial-ground, or adding to any existing church or chapel yard or cemetery, to procure and purchase any such land or ground as may in the opinion of the Commissioners be sufficient and properly situated for a church or chapel yard or burial-ground, or as an addition to any existing church or chapel yard or cemetery, and to make, raise, levy, and collect rates for purchase thereof, or for the repayment with interest of any money borrowed for the making such purchase, at such times and in such proportions as shall be agreed upon with the person or persons advancing any such money, and approved of by the said Commissioners; and the churchwardens or chapelwardens or persons authorized under the said recited Acts to make rates for any of the purposes of the said recited Acts [58 G. 3, c. 45, and 59 G. 3, c. 134] to make rates for any of the purposes of the said recited Acts, of any such parish, chapelry, township, or extra-parochial place, may and shall in every such case use and exercise all the powers and authorities in the said recited Acts, for the purpose of making and completing such purchases, and also the powers and authorities in the said recited Acts specified, as to making, raising, and levying any rates for any of the purposes of the said recited Acts; and when any such land or ground so purchased shall be situate out of the bounds of the parish or place for which the same is intended, the same shall after consecration become and be deemed part of such parish or place; anything, in any Act, law, or custom to the contrary notwithstanding.”

responsive allegation. The now plaintiff, \*the defendant in the Consistory Court, thereupon appealed to the Court of Arches, [\*386 which Court confirmed the decision of the Consistory Court: see the judgment, 7 Jurist, N. S. 805.

The learned counsel referred to the statutes 59 G. 3, c. 134, s. 25, and 3 G. 4, c. 72, s. 26, and to the cases of *Gould v. Gapper*, 3 East 472, 5 East 345, 1 J. P. Smith 528, *Burder v. Veley*, 12 Ad. & E. 233 (E. C. L. R. vol. 40), 4 P. & D. 452, *Veley v. Burder*, 12 Ad. & E. 265, 4 P. & D. 475, and *The Queen v. Willim*, 16 Q. B. 1 (E. C. L. R. vol. 71).

*Dr. Phillimore*, Q. C., and *F. M. White*, in Michaelmas Term last, showed cause. They referred to and commented upon the following statutory provisions and authorities,—58 G. 3, c. 45, ss. 59, 60, 61, 59 G. 3, c. 134, s. 25, 3 G. 4, c. 72, s. 26, and *The King v. The Churchwardens of St. Mary, Lambeth*, 3 B. & Ad. 651 (E. C. L. R. vol. 28), and submitted that the order of the Church Building Commissioners was conclusive as to the fact of the desire of the parish having been duly expressed, and consequently that the learned Judge of the Consistory Court was right in rejecting the responsive allegation; that the issuing of a prohibition would preclude the plaintiffs in the Ecclesiastical Court from showing that the facts alleged in the responsive allegation were untrue; that the proper course would have been to apply to the Court of Queen's Bench for a mandamus to compel the Judge of the Consistory Court to admit the responsive allegation to proof; and that, at all events, prohibition would not lie after the appeal to the Court of Arches.

*Wills*, in support of his rule, insisted that the only legitimate way in which the desire of the parish could be expressed, was, by convening a vestry and duly conducting the proceedings therein to their legal \*termination, viz., by the result of a poll, when duly [\*387 demanded; and, consequently, that the decision of the Judge of the Consistory Court rejecting the responsive allegation of the then defendant, and that of the Court of Arches affirming the decision of the Court below, were erroneous. He referred to *Bacon's Abridgment*, *Prohibition* (B.), *The King v. The Churchwardens of St. Mary, Lambeth*, 3 B. & Ad. 651 (E. C. L. R. vol. 23), *The King v. Dursley*, 5 Ad. & E. 10 (E. C. L. R. vol. 31), 6 M. & M. 333, *Blunt v. Harwood*, 8 Ad. & E. 610 (E. C. L. R. vol. 35), 3 N. & P. 577, *Burder v. Veley*, 12 Ad. & E. 233 (E. C. L. R. vol. 40), 4 P. & D. 452, *Veley v. Burder*, 12 Ad. & E. 265, 4 P. & D. 475, *Richards v. Dyke*, 3 Q. B. 256 (E. C. L. R. vol. 43), 2 Gale & D. 498, *The Queen v. Willim*, 16 Q. B. 1 (E. C. L. R. vol. 71), *Blunt v. Harwood*, 1 Curteis Eccl. R. 648, *Hopton v. Kemerton*, 6 Notes of Cases in the Eccl. Court 74, *Sturmy's Laws of the Clergy*, and *Pollock's County Court Practice* 800.

ERLE, C. J.—We have paid the best attention we are able to the arguments which have been urged before us: but, considering the extreme importance of the interests at stake, and considering the difficulty of construing these Acts of Parliament, we have come to the conclusion that we shall best consult the interests of the public by directing the matter to be put in train for a more solemn investigation. We therefore order that the applicant do declare in prohibition against the churchwardens, and that the time for the latter to show cause against this rule be enlarged until the further order of the Court.

The declaration stated that George White (thereinafter called the plaintiff), by John Bennett, his attorney, in obedience to a rule of this Court of the 25th of November, 1851, declared in prohibition against \*388] Alexander Steele and William Lenton (thereinafter called \*the defendants): For that the defendants were churchwardens of the parish of Plumstead, in the county of Kent and diocese of London, and, as such churchwardens, duly instituted a suit for substraction of church-rates in the Consistory Court of London against the plaintiff, and therein presented their libel against the plaintiff, whereof the material parts consisted of the following articles,—First, that an order was made by Her Majesty in council on the 12th of August, 1859, for the closing of the churchyard of Plumstead, in the county of Kent, from and after the 1st day of November, 1860, and it therefore became necessary to provide a new burial ground for the use of the said parish; that a piece of ground containing by admeasurement 2a. 3p., or thereabouts, lying between the old churchyard and the public highway from Woolwich to Erith, being fit and suitable for the said purpose, Thomas Walker and Sir E. G. L. Perrott, Bart., then the churchwardens of the said parish, made a provisional agreement with the owners of the said land, viz., Queen's College, Oxford, and their lessee, for the purchase of the said land for the sum of 850*l.*; and it was estimated that draining, enclosing, and adapting the said land for the said purpose, and other expenses, would bring the amount to be raised to the sum of 2000*l.*,—Secondly, that, in and by a statute made and passed in the third year of His late Majesty George the Fourth (3 G. 4, c. 72), it is in the 26th section enacted, "that it shall be lawful for the said Commissioners," viz., His late Majesty's Commissioners for building new churches, "to authorize any parish, chapelry, township, or extraparochial place which shall be desirous of procuring a burial-ground, or of adding to any existing church or chapel yard or cemetery, to procure and purchase any such land or ground as may in the opinion of the Commissioners be sufficient and \*389] \*properly situate for a church or chapel yard or burial-ground, or as an addition to any existing church or chapel yard or cemetery (whether such land or ground shall [or shall not] be situate within the parish or place for the use of which the same shall be intended), and to make, raise, levy, and collect rates for the purchase thereof, or for the repayment with interest of any money borrowed for the making such purchase, at such times and in such proportions as shall be agreed upon with the person or persons advancing any such money, and approved of by the said Commissioners; and the churchwardens and chapelwardens or persons authorized under the said recited Acts to make rates for any of the purposes of the said recited Acts, of any such parish, chapelry, township, or extraparochial place, may and shall in every such case use and exercise all the powers and authorities in the said recited Acts for the purposes of making and completing such purchases, and also all the powers and authorities in the said recited Acts specified as to making, raising, and levying any rates for any of the purposes of the said recited Acts;" and that, in and by a statute made and passed in the session of Parliament held in the 19 & 20 Vict. c. 55, it is in the 1st section thereof enacted "that the persons now or hereafter to be appointed to

be Her Majesty's Commissioners for building new churches shall continue to be such Commissioners, and their commission shall continue in force until the 1st of January, 1857, and no longer; and immediately on the determination of such commission, all the duties, powers, and authorities vested in, or which were or might have been performed or executed by such Commissioners, shall become vested in and be performed and executed by the Ecclesiastical Commissioners for England,"—Thirdly, that the aforesaid Thomas Walker and Sir E. G. L. Perrott, the then churchwardens, and \*others of the parishioners and inhabitants, rate-payers of the said parish, on the 9th [\*390 day of January, 1860, met together in the vestry-room of the said parish, pursuant to a notice in writing which had been affixed on the doors of the parish and district churches and the chapels in the said parish of Plumstead previously to the commencement of Divine service on Sundays the 1st and 8th days of January, 1860, and which was to the following effect, "Notice is hereby given that a meeting of the rate-payers of the parish of Plumstead, in the county of Kent, will be holden in the vestry-room of the said parish, on Monday, the 9th day of January next, at 3 o'clock in the afternoon, to take into consideration the expediency of purchasing and adding to the churchyard of the parish a piece of land lying between the same and the public highway leading from Woolwich to Erith: also to authorize the raising by a rate or rates, or by a loan on the credit of the same, of such sum or sums of money as may be required to meet the expenses of and incident to the purchase and conveyance of the said land and the preparation of the same as and for the purposes of a burial-ground, and the provision of a lodge and chapel and reception house (if necessary); and, in case such purchase shall be determined on, to take into consideration the expediency of closing the carriage entrance at the south-west corner of the present churchyard, heretofore used for funerals, and of stopping up the footpath leading across the churchyard in a north-easterly direction from the said south-west corner thereof, into the manor way from the north-eastern entrance to such footpath to the point where the same joins the path leading from the south-west corner of the churchyard to the church-door, when and as soon as the additional burial-ground shall have been provided, and a road and pathway shall have \*been made across the same from the said highway to the said [\*391 pathway leading to the church door; and for other purposes: and further to consider the propriety of cancelling or rescinding any resolutions passed at the vestry meeting held on the 28th day of November last, and to substitute other resolutions in lieu thereof for the effecting the above-mentioned purposes:" dated, &c., and signed by the churchwardens and overseers: That, the Rev. William Acworth, the vicar, having taken the chair at the said meeting, it was moved by Sir E. G. Perrott, Bart., and seconded by William Henry Dutton, inhabitants and rate-payers in the said parish, that the first and second resolutions passed at the last vestry-meeting be rescinded; whereupon an amendment was moved by the Rev. John M'Crea, and seconded by Edward Fordham, also inhabitants and rate-payers of the said parish, that this meeting be adjourned until an early day in the ensuing week, to be held at 7 or 8 o'clock in the evening, at the central school-room,

for the purpose of electing a burial board, and that due notice be given thereof by the churchwardens; that the said amendment having been duly put to the said meeting, was rejected by a large majority; that the original resolution was then put and carried by a large majority; that it was then moved by William Edward Dawson, an inhabitant and rate-payer of the said parish, and seconded by the aforesaid Rev. John M'Crea, "that, a new burial-ground or an addition to the present churchyard being necessary, the churchwardens be authorized to purchase, on behalf of the parish, upon such terms as they shall deem proper, at a price not exceeding 850*l.*, exclusive of incidental expenses, the piece of ground, containing by admeasurement 2*a.* 3*p.*, or thereabouts, lying between the present churchyard and the public highway leading from Woolwich to Erith, and to adapt the same piece \*392] of land as a burial-ground by throwing it into the present churchyard, and that the sum of 1000*l.* to meet the expenses of and incident to the purchase and preparation of the land, be borrowed on the credit of rates to be levied for repayment thereof by two instalments, one in the present year, and the other in the year 1861, and that the churchwardens be empowered to apply to the proper authorities for the approval of the proposed additional burial-ground, and for the requisite authority to carry the foregoing resolutions into effect under the 26th section of the 3 G. 4, c. 72, and, on obtaining the same, to take all necessary steps for procuring the loan of the money at a rate not exceeding 5*l.* per cent., and to execute proper securities on the part of the parish;" and that the said last-mentioned resolution, having been duly put, was carried by a majority of fifty-nine to five, such fifty-nine persons being the major part of the inhabitants of the said parish then assembled and present at the said very,—Fourthly, that, previous to the resolution last aforesaid, application was made by or on behalf of the said Alexander Steele and William Lenton, the churchwardens, parties in this suit, who since the vestry meeting referred to in the last preceding article had been duly elected, appointed, and admitted churchwardens of the said parish, after having made the declaration required by law (as is more particularly mentioned in the tenth article of this libel), to Her Majesty's principal secretary of state for the home department for his approval of the said land as and for an addition to the said churchyard, and by a letter in writing, bearing date the 20th of February, 1860, George Clive, Esq., on behalf of the said secretary of state, signified the said secretary of state's approval of the same; that application was afterwards made by or on behalf of the said Alexander Steele and William \*393] Lenton to the Ecclesiastical Commissioners for England for their authority to carry the foregoing resolutions of vestry into effect; that the said Ecclesiastical Commissioners for England, by an instrument in writing under their common seal, bearing date the 7th day of June, 1860, in exercise and execution of the powers and authorities in that behalf contained in several Acts of Parliament, and particularly in the said Act of the 3 G. 4, c. 72, s. 26, signified their opinion that the said piece of land was sufficient and properly situated as and for an addition to the said churchyard, and their approval of the purchase of the said land for the purpose aforesaid, and of the arrangements made or entered into for borrowing the sum of 1000*l.* to

meet the expenses of and incident to the purchase and preparation of the same land as and for a burial-ground, and authorized and empowered the said parish to procure and purchase the said land, and to borrow the sum of 1000*l.* on security of two rates to be made, raised, levied, and collected, one in the present year, and the other in the year 1861, for the repayment of the said sum of 1000*l.*, with interest at the rate of 5*l.* per cent. per annum, by two equal instalments, the first of such instalments, with interest on the said sum of 1000*l.* as from the date of the lease, to become due and be paid on the 29th of September, 1860, and the second instalment, and interest thereon as from the 29th of September, to become due and be paid on the 1st of May, 1861. The fifth of the said articles exhibited and made part of the said libel the letter of the said George Clive and the instrument under the common seal of the said Ecclesiastical Commissioners referred to in the last article [a copy was set out],—Sixthly, that the churchwardens aforesaid, parties in this cause, having, in pursuance of the authorities aforesaid, and of the resolution of vestry in the third article of the libel last mentioned, borrowed and raised [\*394 \*from the London and County Joint Stock Banking Company the sum of 1000*l.*, repayable, with interest at the rate of 5*l.* per cent. per annum, at the times mentioned in the fourth article of this libel, or or about the 30th of June, 1860, under and by virtue of the authority obtained from the said Ecclesiastical Commissioners for England, by an instrument in writing under their hands and seals charged the said parish with the sum of 1000*l.*, and with the repayment thereof according to the terms and conditions mentioned in the said fourth article of this libel; and, in pursuance of the provisions of the Acts of Parliament passed for the building and the promoting the building of additional churches in populous parishes, declared that the said sum of 1000*l.* should continue to be chargeable and charged upon the rates raised or to be raised in the said parish under the authority aforesaid, and in accordance with the provisions of the said Acts, until the said sum of 1000*l.*, together with the interest after the rate of 5*l.* per cent. per annum, should be fully repaid: that the said Alexander Steele and William Lenton duly proceeded with the purchase of the said land, and the same was on or about the 14th of July, 1860, duly conveyed to the Ecclesiastical Commissioners for England, under the provisions of the said Acts commonly known as the Church Building Acts, to be devoted when consecrated to ecclesiastical purposes for ever, by virtue and according to the true intent and meaning of the said several recited Acts, as and for an addition to the churchyard of the parish of Plumstead aforesaid; and that the said land was duly consecrated by the Right Rev. Father in God, Archibald Campbell, Lord Bishop of London, and the same is now used as a burial-ground,—Seventhly, that, under and by virtue of the said Ecclesiastical Commissions, and under the forms \*and authorities contained in divers Acts of Parliament, and especially in the 58 G. 3, c. 45, [\*395 ss. 55, 56, 59, 61, 59 G. 3, c. 134, s. 25, and 3 G. 4, c. 72, s. 26, and pursuant to the aforesaid resolution last set forth in the third article of this libel, the said Alexander Steele and William Lenton, on the 14th of July, 1860, made a rate of 4*d.* in the pound on all the rateable properties in the said parish, and upon the several inhabitants and

occupiers of the houses and premises in the said parish, under the authority of the Ecclesiastical Commissioners for England, in pursuance of the Act of Parliament of the 3 G. 3, c. 72, for repayment with interest of the first instalment (being a moiety) of a loan of 1000*l.* borrowed in accordance with a resolution of the rate-payers of the parish of Plumstead, in the county of Kent, in vestry assembled on the 9th of January, 1860, and under the authority of the said Commissioners, for making and completing the purchase of the parcel of land adjoining the churchyard of the said parish, for the purpose of providing a new burial-ground for the said parish, and approved by the secretary of state for the home department, in accordance with the provisions of the Act to amend the laws concerning the burial of the dead in the Metropolis, of the 15 & 16 Vict. c. 85; that the greater number of the inhabitants of the said parish had paid the sum of money at which they were respectively rated and assessed in and by the said rate; and that the said rate of 4*d.* in the pound would, if levied, amount to the sum of 617*l.* 8*s.* 5½*d.*, as would more particularly appear in the book in the ninth article of the libel mentioned.

The subsequent articles of the libel set forth that the plaintiff was duly rated in the said rate at a sum of 6*s.* 8*d.*, that he had refused to pay the same when demanded, and had been duly summoned for such \*396] refusal before the magistrate of the Woolwich Police Court, being the proper tribunal in that behalf, and had then and there refused to pay the said sum, on the ground that he disputed the validity of the said rate. Averment, that thereupon such proceedings were had in the said Consistory Court that the plaintiff was ordered to put in his responsive allegation to the said libel; whereupon the plaintiff claimed to put in the responsive allegation whereof the following are the material parts:—First, that, prior to the meeting of the churchwardens and others of the parishioners and inhabitants, rate-payers of the parish of Plumstead (howsoever), convened and held on the 9th of January, 1860, pleaded in the third article of the libel given in and admitted in this cause, to wit, on the 28th of November, 1859, the churchwardens and others of the parishioners and inhabitants, rate-payers of the said parish, met together in the vestry-room of the said parish pursuant to due legal notice; that such meeting was attended by Sir E. G. L. Perrott, one of the churchwardens, and by the overseers of the said parish, and by the Rev. William Acworth, the vicar, who took the chair thereat, and by about sixty rate-payers of the said parish; that one of the churchwardens then reported to such meeting that he had received an intimation from Her Majesty's secretary of state for the home department that interments must be discontinued in the churchyard of the parish of Plumstead after the 1st of November, 1860, and that it would therefore be necessary to provide burial accommodation for the parish immediately; that the said churchwarden then stated to such meeting that he had applied to the owners and the lessees of certain land which was described to the said meeting, and that the owners were willing to sell the freehold for \*397] the sum of 400*l.*, and the lessee to sell his interest for the \*sum of 450*l.*, and that a sum of about 1000*l.* would be required to lay out the land as a burial-ground; that resolutions in the words or to the effect following were then proposed to the meeting, viz.—First,

that the churchwardens be authorized to purchase on behalf of the parish (upon the terms stated) the land here defined, to adapt the ground as a burial-ground by throwing it into the present churchyard or otherwise, and draining and laying it out (as described), provided that one-third of the area at least be allocated as an unconsecrated place, for the interment of nonconformists,—Secondly, that, for the purposes mentioned, including a double chapel, 2500*l.* be borrowed on credit of rates to be levied for repayment thereof, and that the churchwardens apply to the proper authorities for approval of the new burial-ground, and for authority for carrying these resolutions into effect under the 26th section of the 3 G. 4, c. 72, and, on obtaining the same, to take all necessary steps for procuring the loan of money, and executing securities,—Thirdly, that, as soon as the foregoing resolutions are carried into effect, and the land before described is added to the churchyard, to make roads and footpaths, as before described; that such resolutions were seconded, and carried by the meeting :

Secondly, that, at the vestry meeting howsoever convened and held on the 9th of January, 1860, it was moved by Sir E. G. L. Perrott, Bart., and seconded by W. H. Dutton, that the first and second resolutions passed at the last vestry meeting be rescinded; that an amendment was thereupon moved by the Rev. John M'Crea, and seconded by Edward Fordham, inhabitants and rate-payers of the said parish, that this meeting be adjourned until an early day in the ensuing week at seven or eight o'clock in the evening, at the central school-room, for the purpose of electing a \*burial board, and that due notice be given thereof by the churchwardens; that the said [\*398 amendment, having been put to the meeting, was declared to be rejected; that the original resolution was then put and declared to be carried; that thereupon the said George White, &c., &c., some or one of them, demanded a poll, and the same was refused and was not granted by the chairman: and the party proponent alleges and propounds that everything done or attempted to be done at such meeting after the demand and refusal of a poll as before pleaded, or subsequent thereto, in consequence of any resolution passed or alleged to have been passed at such meeting, was null and void to all intents and purposes in law whatsoever:

Thirdly, that, notwithstanding the premises pleaded and set forth in the next preceding article of this allegation, the said vestry meeting was continued: and it was then proposed by W. E. Dawson, and seconded by the Rev. John M'Crea, "that, a new burial-ground or an addition to the present churchyard being necessary, the churchwardens be authorized to purchase, on behalf of the parish, upon such terms as they should deem proper, at a price not exceeding 850*l.*, exclusive of incidental expenses, the piece of ground, containing by admeasurement 2*a.* 3*p.*, or thereabouts, lying between the present churchyard and the public highway leading from Woolwich to Erith, and to adapt the same piece of land as a burial-ground, throwing it into the present churchyard; and that the sum of 1000*l.* to meet the expenses of and incident to the purchase and preparation of the land be borrowed on the credit of the rates to be levied for repayment thereof by two instalments, one in the present year, and the

other in the year 1861, and that the churchwardens be empowered to apply to the proper authorities for approval of the proposed additional \*399] burial-ground, and for the \*requisite authority to carry the foregoing resolutions into effect under the 26th section of the 3 G. 4, c. 72, and, on obtaining the same, to take all necessary steps for procuring the loan of the money at a rate not exceeding 5 per cent., and to execute proper securities on the part of the parish;" that such resolution was put to the meeting, and declared to be carried; whereupon, the said George White, &c., &c., some or one of them, demanded a poll upon such resolution, which was refused and not granted by the chairman:

Fourth, that the parish of Plumstead contains about 1800 rate-payers who are assessed to the rate in question in this cause in respect of 2445 properties therein, and that, of such number, only about seventy rate-payers attended the meeting:

Fifth, that, by reason of the premises mentioned and set forth in the preceding articles of this allegation, the application of the said Alexander Steele and William Lenton to the Ecclesiastical Commissioners for England for authority to carry the pretended resolution of vestry of the 9th of January, 1860, into effect, as pleaded in the fourth article of the said libel, was unauthorized; that the instrument in writing bearing date the 7th of June, 1860, under the common seal of the Ecclesiastical Commissioners for England, pleaded and exhibited in the said fourth and fifth articles of the said libel, was and is null and void to all intents and purposes in law whatsoever:

Sixth, that the borrowing and raising the sum of 1000*l.*, and the making a rate of 4*d.* in the pound on all the rateable properties in the said parish, or on the several inhabitants and occupiers of houses and premises in the said parish, as pleaded in the sixth and seventh articles of the said libel, was and is unauthorized and null and void to all intents and purposes in law whatsoever:

\*400] \*And thereupon the counsel for the defendants objected to the admission of the said responsive allegation, and asked the said Consistory Court to reject the same: and the counsel for the plaintiff then urged and insisted, amongst other things, that the said resolutions were null and void, and the said rates bad, because of the demands and refusals of a poll in and by the said responsive allegations set up: But the learned Judge of the said Consistory Court gave judgment rejecting the said responsive allegation, as affording no answer to the libel of the defendants: And the plaintiff then duly brought and prosecuted his appeal against the judgment of the said learned Judge in the Court of Arches of Canterbury; and, after hearing counsel for the plaintiff, who urged and insisted as alleged to have been urged and insisted in that behalf in the Court below, and counsel for the defendants, the learned Judge of the said Court of Arches, sitting in the Common Hall of Doctors' Commons, in the city of London, gave judgment that the said responsive allegation, if admitted, would be no answer to the said libel, and accordingly affirmed the judgment of the said learned Judge of the said Consistory Court of London, and rejected the said responsive allegation: Averment, that the said polls mentioned in the said responsive allegation were demanded and refused as therein alleged; and that all the other facts

therein mentioned, and thereby intended to be set up by way of answer to the said libel, and the demands of the defendants as such churchwardens, are true; yet the defendants and the said Court of Arches have proceeded and are proceeding in the matter of the said suit; wherefore the plaintiff prays judgment of this Court that a writ of prohibition may issue prohibiting the said Court of Arches from proceeding further in the matter of the said suit, and that the plaintiff may \*have his costs and damages pursuant to the statute in [\*401 that case made and provided.

The defendants pleaded, First,—as to so much of the declaration as states that the polls mentioned in the responsive allegation were demanded and refused as therein alleged, and that all the other facts therein mentioned and thereby intended to be set up by way of answer to the libel, and to the demands of the defendants as such churchwardens, are true,—that the polls mentioned in the said responsive allegation were not nor was either of them demanded or refused as therein alleged; and, further, that the matters and things in the libel mentioned and alleged, in so far as the allegations thereof are not admitted by or are inconsistent with the said responsive allegation in the declaration mentioned, were and are true; and, further, that the said parish of Plumstead in the libel and in the declaration mentioned, was, at the time of the issuing of the said order or authority of the Ecclesiastical Commissioners as in the libel and declaration is mentioned, desirous of adding to its existing churchyard; and, further, that the book containing the proceedings of the said vestry had for two months after the said meeting had been held, been open to the proprietors of messuages, lands, and tenements within the said parish, and that no dissents were recorded or entered therein; and that the issuing of the said order or authority by the Ecclesiastical Commissioners was delayed for such two months as aforesaid; wherefore the defendants prayed that the said writ of prohibition in the declaration mentioned might not issue.

Secondly, as to the whole declaration, that, by the practice of the Court of Arches, and of the Consistory Court in the declaration mentioned, if the learned Judges of the said Courts respectively, or the said learned Judge of the said Court of Arches, had given [\*402 \*judgment that the said responsive allegation in the declaration mentioned would be an answer to the said libel in the declaration mentioned, and had admitted and not rejected the said allegation, the defendants would have been entitled to have had the issues in fact raised by the said libel and responsive allegation tried and determined by the Judges of one of the said Courts, according to the law and practice of the said Courts; and that, if the writ of prohibition prayed in and by the said declaration was to issue in the manner and form as was therein prayed, and not otherwise, they the defendants would be deprived of the said right to which by the practice of the said Courts they are or would be entitled as aforesaid; whereupon the defendants said that the said writ of prohibition claimed or prayed in the declaration might not issue, but that the said Court of Arches might be prohibited from proceeding in the said cause (if at all) only until and so far as, and in order that, the said responsive allegation should and might be admitted, and such proceedings had as that the said issues

in fact raised in and by the said libel and allegation might, according to the law and practice of the said Courts respectively, or the said Court of Arches, be tried and determined as aforesaid.

Thirdly, that the said writ ought not to issue, for that in and by the law and practice of the said Court of Arches, and by virtue of the statutes in that case made and provided, an appeal did so soon as the said judgment was pronounced, and still doth, lie from the said decision and judgment of the learned Judge of the said Court of Arches in the declaration mentioned to the judicial committee of the privy council, and that the said Court of Arches and the said judicial committee on appeal had and have jurisdiction in and over the said cause, \*403] and to decide the questions both of law and fact raised by the said libel and responsive allegation respectively; that, when the judgment of the said learned Judge of the Arches Court, affirming the judgment of the learned Judge of the Consistory Court, and rejecting the responsive allegation in the declaration mentioned, was given, the said plaintiff immediately, by his proctor then present, appealed from the said judgment of the Judge of the Court of Arches to the judicial committee of the privy council aforesaid, and was duly assigned then and there by the said Court of Arches to prosecute his said appeal; wherefore the defendants prayed that the said writ of prohibition prayed in the declaration might not issue.

And the defendants further said that the declaration of the plaintiff was bad in substance, wherefore also they prayed that the said writ of prohibition might not issue. The ground of demurrer stated in the margin was, "that the judgment of the Court of Arches was right in deciding that the responsive allegation was no answer to the libel."

The plaintiff took issue on each of the pleas. He also demurred to the second and third pleas, the grounds of demurrer stated in the margin being,—as to the second plea, "that it merely states supposed matter of law, and raises no question of fact whatever for a jury to try;" and, as to the third plea, "that the right to prohibition is not taken away by appealing." Joinders.

\*404] *A. Wills*, in support of the demurrer, (a) in addition \*to the authorities to which he referred on the former occasion, cited *Campbell v. Maund*, 5 Ad. & E. 865 (E. C. L. R. vol. 31), 1 N. & P. 558 (E. C. L. R. vol. 36), *The Queen v. Hedger*, 12 Ad. & E. 139 (E. C. L. R. vol. 40), 4 P. & D. 61, and *The Queen v. The Governors and Guardians of the Parish of Newington*, 6 D. & L. 162.

*F. M. White* (with whom was *Dr. Phillimore*, Q. C.), for the defend-

(a) The points marked for argument on the part of the plaintiff in prohibition were as follows:—

In support of the declaration in prohibition,—“1. That, if a poll was demanded and refused, there was no resolution of vestry, and it could not be said that the parish was desirous to procure the burial-ground or borrow the money:

“2. That, consequently, the churchwardens had no right to borrow the money, and the parish is not liable to pay it:

“3. That the order of the Ecclesiastical Commissioners was immaterial in this respect.”

In support of the demurrer to the second plea,—“1. That it sets out no matter of fact to be tried by a jury, but is in fact a statement of the supposed ground of demurrer:

“2. That it does not go to the whole of the declaration, but merely suggests what judgment the Court ought to give.”

In support of the demurrer to the third plea,—“That the right to prohibition is not taken away by appealing.”

ants, (a) cited Anonymous, 6 Mod. 308, 2 Salk. 553, Darby v. Cosens, 1 T. R. 552, Re Batkin and \*The Justices of Staffordshire, 25 Law J., M. C. 126, Rand v. Green, 9 C. B. N. S. 470 (E. C. L. R. vol. 99), and Rolle's Abridgment, *Prohibition* (N.) 1. [\*405]

(a) The points marked for argument on the part of the the defendants were as follows :

"1. That the declaration is bad, because it does not show that a writ of prohibition ought to issue :

"2. That the proceedings and pleadings in the Arches Court as set out show that that Court decided rightly in rejecting the responsive allegation inasmuch as that allegation gives no answer to the libel :

"3. That the said responsive allegation only alleges that certain polls were demanded and refused ; that the legislature has not made it necessary to the validity of the order of the Ecclesiastical Commissioners authorising and empowering a parish under the 3 G. 4, c. 72, s. 26, to procure an additional burial-ground, and to levy rates for that purpose, that a poll, if demanded, on a resolution of vestry to ask for such power and authority, should be granted :

"4. That, at any rate, the Ecclesiastical Commissioners having granted their authority under their seal to procure the burial-ground and to make the rates, and the ground having been purchased and the money borrowed accordingly, the Court of Arches was right in determining that an allegation that a poll was demanded and refused as aforesaid, was no answer to a demand for a rate which had been made in pursuance of such power and authority :

"5. That the Court of Arches could not in such a case look beyond the Commissioners' order, and set it aside on the ground of irregularity in the mode in which the desire of the parish applying for the order was expressed :

"6. That the legislature has simply required that the parish shall be desirous of procuring a burial-ground, and that it has not by the said 26th section of the 3 G. 4, c. 72, defined or required any particular expression of that desire ; but that it is enough if the Commissioners are satisfied that such a desire exists :

"7. That, even assuming that the Court of Arches could look beyond the authority of the Commissioners, it appears on the face of the libel that all the requisite preliminaries have been complied with, in that it appears on the face of the libel that the desire of the parish was amply expressed ; that the meeting at which the resolutions to apply for the Commissioners' authority to borrow money and to make the rates were proposed and carried by a majority of those present, was convened by notice given on two successive Sundays, in manner provided by s. 25 of the 59 G. 3, c. 134 (which section, among others, is incorporated by the 3 G. 4, c. 72, s. 26) ; and that that section provides a statutory mode of obtaining the consent of a parish to a rate, which dispenses with the rules of common and ecclesiastical law as to the demand and grant or refusal of polls in ordinary cases :

"8. That the libel also shows that the provisions of the 24th section of the 59 G. 3, c. 134, have been complied with, and that the consent of the parish has been expressed in accordance with that section :

"9. That the declaration is also bad in this, that it prays that an absolute writ of prohibition should issue, whereas it should have concluded with a prayer that the Court should be prohibited from proceeding until and unless it admitted the responsive allegation,—the effect of an absolute prohibition being, to deprive the defendants of a right which they would have had according to the practice of the Court of Arches and the Consistory Court of London, if the said Courts had not rejected the responsive allegation, viz. to have had the issues in fact raised by the said libel and responsive allegation tried by the Judges of the said Courts, or one of them, according to the practice of such Courts :

"10. In support of the second plea, the defendants will contend that this Court does not take judicial notice of the practice of the Ecclesiastical Courts, and that such practice must be proved ; that, even if the issue joined on the allegations as to such practice raises matter of law and not of fact, yet that the defendants have a right under the statute 1 W. 4, c. 21, to state the matters alleged in that plea on the record, as such matters are proper to show that the writ ought not to issue, for the reasons stated in the plea :

"11. In support of their third plea, the defendants will contend that the subject-matter of the decision and the interpretation of the statute being peculiarly matter for the decision of the Court of Arches and the Privy Council, on appeal, and such being the tribunals to which the legislature has intrusted the questions in dispute, the plea, by stating the fact that the plaintiff has appealed to the Privy Council, alleges a matter which is proper to show that the prohibition ought not to issue : Rand v. Green, 9 C. B. N. S. 470 (E. C. L. R. vol. 99) ; 2 Roll. Abr. *Prohibition* (N.) 1."

\*406] *Wills*, in reply, referred to *Cornwall v. Woods*, 4 \*Notes of Cases in the Ecclesiastical Court, p. 555, and *Alcard v. Wesson*, 7 Exch. 753.† *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the Court:—

We are of opinion that our judgment must be for the plaintiff.

The material facts may be expressed in a very few words. At a vestry meeting of the parish of Plumstead, \*a resolution was  
\*407] passed that the churchwardens should purchase, on behalf of the parish, a piece of ground as an addition to the existing churchyard. A minority, who seem to have been desirous, instead of proceeding under the Church Building Acts, to proceed under the Burial Acts (whereby a cemetery might be obtained, partly consecrated and partly unconsecrated, for the general use of all the inhabitants), demanded a poll, which was refused. The resolution of the vestry was communicated to the Church Building Commissioners, who thereupon authorized the parish to purchase the land and to levy rates to defray the expense. Money was borrowed, the land purchased, and the rate now in dispute was accordingly made. The now plaintiff declined to pay the rate. The churchwardens thereupon instituted against him a suit in the Consistory Court of London for subtraction of church-rates. The now plaintiff, being defendant in that suit, claimed to put in a responsive allegation, to the effect that, a poll having been demanded and refused, the parish had never legally expressed its desire to procure a burial-ground, under the statute 3 G. 4, c. 72, s. 26, and that the order of the Commissioners and all proceedings based upon it, including the rate in question, were consequently illegal.

The Consistory Court decided in favour of the churchwardens, by rejecting the responsive allegation. The present plaintiff appealed to the Court of Arches, which Court confirmed the decision of the Court below. Thereupon the unsuccessful party, the now plaintiff, by direction of this Court, declared in prohibition.

The main question here and in the Ecclesiastical Court is the same; and it is this,—*Has the parish expressed its desire in a legal manner*, so that the Commissioners can legally act upon that expression of desire?

\*408] \*We think the parish has not legally expressed its desire. We know of no legal mode of ascertaining the desire of a parish, but by convening a vestry, and duly conducting the proceedings therein to their legal termination. The result of a poll, when claimed, is the only legal termination. It is obvious that a vestry which *refuses* a poll may not, and most likely does not, speak the sense of a parish. Moreover, the right to a poll exists at common law, and rests on the strongest authority: see *Campbell v. Maund*, in the Exchequer Chamber, 5 Ad. & E. 865 (E. C. L. R. vol. 31), 1 N. & P. 558 (E. C. L. R. vol. 36.) It has even several times been held that the right to a poll is not taken away by mere general words in a statute, which words might at first sight seem to import that the inhabitants assembled at the vestry might then and there finally decide a question: *The Queen v. St. Mary, Lambeth*, 8 Ad. & E. 356 (E. C. L. R. vol. 35), 3 N. & P. 416.

It is objected that the statute 3 G. 4, c. 72, s. 26, gives the parish the powers conferred by the former Acts, and therefore, among others, the powers conferred by the 59 G. 3, c. 134, s. 25, which section, it is

alleged, impliedly takes away a poll. But the answer is, that that section (59 G. 3, c. 134, s. 25) only relates to the power of the vestry in raising rates. It is therefore unnecessary to decide whether a poll could or could not be refused at a vestry duly convened under that statute for that purpose alone.

Next, it is objected that chapelries, townships, and extraparochial places, which are mentioned in the 3 G. 4, c. 72, s. 26, along with parishes, have no vestries. But the answer is, that, from the fact that in districts like these, in which, they having no vestries, no vestry can act, it by no means follows, that, where there is a vestry, as in the case of a parish, the legitimate representatives of the inhabitants should be impliedly superseded. Indeed, the reason why a vestry is not \*mentioned in terms in this part of the 26th section may [\*409 well be that the power of speaking by a vestry exists in some only of the districts mentioned, and not in all. How the desire is to be expressed in other cases, whether by unanimity, or by a majority with or without any restriction imposed by statute, we have not now to decide.

Upon these grounds, we have come to the conclusion that the desire of the parish to procure a burial-ground has not been expressed according to law.

We are confirmed in this decision by the opinion of the learned Judge of the Court of Arches, and, as we are informed, of the learned Judge of the Consistory Court also. Yet these learned Judges seem to have thought that the Ecclesiastical Court could not look behind the order of the Commissioners, and were therefore bound to regard it as effectual. But the plain words of the statute 3 G. 4, c. 72, s. 26, empower the Commissioners to act only in cases where the parish is desirous that they should act. The desire of the parish legally expressed appears to us a condition precedent, without which any order or authority of the Commissioners is devoid of any legal force. And surely this is a reasonable construction, when it is considered, that, to hold the order of the Commissioners binding without the desire of the parish, would be to invest them with the arbitrary power of inflicting pecuniary burthens and imposing taxes. We therefore come to the other conclusion, that the order is void, and that all proceedings based upon it, including the rate in question, are void also.

It is suggested, that, if the Ecclesiastical Courts have misconstrued the Acts of Parliament, that misconstruction is the subject of appeal; and the third plea states the pendency, or at least a notice, of an appeal. But it by no means follows, that, because the \*misconstruction of an Act of Parliament by the Ecclesiastical Court [\*410 may be corrected on appeal, it is not also ground for prohibition: for, as was observed in *Burder v. Velej*, 12 Ad. & E. 259 (E. C. L. R. vol. 40), the error may be repeated in a Court of superior jurisdiction, as has indeed already been done in the case now under consideration; and the proceedings may there go on to final judgment, and, being regular on the face of them, the power to prohibit may be lost.

With respect to the form of our judgment on the issues of law raised on this record, that which arises upon the demurrer to the third plea has been already disposed of.

The second plea appears to have been pleaded with a view to raise the question whether, in case of judgment for the plaintiff, a peremptory prohibition should go, or only a prohibition quousque, viz. until the Judge of the Court of Arches may alter his opinion upon the construction of the statute, and admit the responsive allegation. Upon this point, no authority has been found, nor any sound reason given for issuing the writ otherwise than in the general form, in cases where the erroneous decision goes to the merits of the case. The party seeking a prohibition upon the ground that the subordinate Court has rejected as irrelevant a defence under a statute which is said to have been misconstrued, must, in order to establish the gravamen, show, not merely that the defence is valid in law, but also that it is true in fact. That course is in accordance with many precedents, and it has, we think, been correctly adopted in the present case. The defendants in prohibition have therefore the opportunity of trying in this proceeding the question whether the matter alleged in answer to the libel be true. If it be not established in proof, the judgment will be for a \*411] consultation. Until its truth is established, no \*peremptory prohibition will go. If its truth should be established, then it will appear to the Court judicially, and in a suit between the same parties, that any further proceeding in the subordinate Court would or ought to be fruitless. Thus, the prohibition, if in the event it shall go, ought to be peremptory.

The case cited by Mr. *White*, in his able argument for the defendants,—Anonymous, 6 Mod. 308,—to show that the Court, if adverse, ought to grant the prohibition quousque only, seems, when properly considered, to be an authority to the contrary; for, the application was for a prohibition upon the ground, first, that a copy of the libel was refused, and, secondly, upon the merits; and that application was rejected by Lord Holt and his companions as improperly asking inconsistent remedies,—the prohibition for refusing a copy of the libel being conditional only, and the prohibition upon the merits being peremptory,—as we think the prohibition in this case, being upon the merits, ought, if and when issued, to be.

The practice of issuing a prohibition quousque for denying a copy of the libel, was traced through Fitzherbert's *Natura Brevium*, 43 E., to the Year Book of Edward 4 (M. 4 E. 4, fo. 37, a), where a special prohibition quousque appears to have been framed by this Court, in order to enforce the statute of 2 H. 5, stat. 1, c. 3, which entitled parties cited in the Court Christian to demand a copy of the libel. In such cases, when prohibition is asked by reason of a refusal to grant a copy of the libel, the difficulties present themselves, that, in the absence of the libel, there can be no prohibition for defect or abuse of jurisdiction, and that the subordinate Court has not yet given any decision upon the merits. These difficulties, which do not exist in the present case, were got over in the case in the Year Book, by issuing the special form of prohibition.

\*412] \*There may be other cases in which such a special writ may be proper; for instance, there is authority for saying, that, in matters purely of ecclesiastical cognisance, where a particular sort of evidence is refused which, according to the rules of the common law, ought to have been admitted,—a matter which affects the manner and

form of proceeding only,—the prohibition is quousque. This is inapplicable to the present case; and, although in many cases in the books prohibition has been granted for rejection of a plea to the merits, in none can we find any trace of a suggestion unverified, or of any prohibition therein issued quousque only. We must, therefore, treat such a special prohibition as exceptional, applicable only to the manner and form of proceeding, and inappropriate to a case where a defence upon the merits has been rejected below, and must be established here in law and in fact in order to sustain the prohibition.

The special writs mentioned in Fitzherbert's *Natura Brevium*, 39 H, and in which directions were given as to the course to be pursued in the subordinate Court, in the nature of admonitions to such Courts, if or unless certain matters should judicially appear to them, relate to obsolete proceedings governed by peculiar considerations. Those writs were confined to the manner and order of proceeding, and were quite distinct in their character from a prohibition upon the merits.

The writs in the Register and elsewhere which conclude with a mandamus to the Court Christian to recall an excommunication already erroneously fulminated, or a sequestration wrongly issued, are all, as to the prohibitory part, peremptory, and the mandamus to revoke the unauthorized proceeding only accessory to the peremptory prohibition, and necessary to give it effect.

\*A mandamus to the Judge of the Court of Arches, to receive the responsive allegation, contrary to his solemn judgment already pronounced, which is presumably his final opinion, would be not only an anomalous, but, so far as the research of counsel and the industry of the Court enable us to judge, an unprecedented proceeding; and, if no such mandamus can be issued, then the litigation may never come to an end, if the case, so far as it is before us, be not once for all disposed of here.

Our conclusion, therefore, is that the allegation which the Court of Arches rejected as constituting no defence to the libel, though assumed to be true, was so rejected by reason of an erroneous construction of the statute, being a matter of temporal cognisance, and this Court being of opinion that the rejected allegation was a complete and substantial answer to the libel in point of law, ought, if and when such allegation shall appear to be true in fact, peremptorily to prohibit any further proceeding.

Judgment for the plaintiff.(a)

(a) The issues of fact came on to be tried before Martin, B., at the last Assizes at Guildford, when a verdict was found for the plaintiff for 40s., with leave to him to move to increase the damages to 90l., being the amount of the costs which he had been put to by the abortive proceedings in the Ecclesiastical Court.

*See*, Serjt, in Michaelmas Term, 1862, accordingly moved to increase the verdict; but the rule was refused.

*Borill*, Q. C., in the same term, moved for and obtained a rule nisi for a new trial, on the grounds of misdirection, and that the verdict was not warranted by the evidence,—which rule is now pending.

**\*414] \*SHEPHARD and Another v. PAYNE and Another. June 2.**

A claim for fees of office,—*ex. gr.* fees of the registrar of an Archdeaconry Court,—to be valid, must be founded upon immemorial usage.

The office of registrar of an Archdeaconry Court, being a freehold office, with duties of a continuous and presumably perpetual character, and one whose existence is essential to the due exercise of the functions of the archdeacon, is an office to which fees may be annexed by immemorial usage.

The fact of such fees having been paid and received from the year 1727 down to the present time, is evidence from which the immemorial receipt of them ought to be presumed, if they could have had a legal origin; and the fact of their amount having from time to time been varied, does not necessarily affect their validity.

In considering the reasonableness of such fees, regard may be had to the amounts established by statute for similar services rendered by other officers, and to the fees formerly paid in the Courts of Westminster Hall and at the Assizes.

It is only in respect of services rendered, or which the officer is ready and willing to perform, that such a claim can be substantiated.

The archdeacon's visitation operating for the benefit of the parish at large, and, among others, of the churchwardens themselves, the performance of whose duties is facilitated by the services of the registrar, the fees payable to that officer are properly chargeable upon the churchwardens.

For three centuries the practice of the archdeacons had been, in order to avoid expense, instead of visiting each parish in the archdeaconry separately, to divide the archdeaconry into districts, and to hold the visitation for all the parishes of that district at some one parish church within the district:—Held, that a visitation so held was not open to objection in a temporal Court.

THIS was an action brought to recover certain moneys amounting to 2*l.* 3*s.* 6*d.*; and, by consent of the parties, and under a Judge's order, the following case was stated for the opinion of the Court:—

The plaintiffs hold the office of registrars of the Archdeaconry Court of Colchester, in the diocese of Rochester. The defendants are churchwardens of the parish of Little Totham, in the county of Essex, which is within the archdeaconry.

The archdeaconry of Colchester comprehends about two hundred parishes in the county of Essex, divided into eighteen rural deaneries, over the whole of which the archdeacon (the Venerable Charles Parr Burney, D.D.) has jurisdiction as ordinary; and in subordination to him are the following officers,—

The "Official," who is the Judge of the Archdeaconry Court, and the substitute for the archdeacon when not personally present. The office is held for life by Maurice Charles Merttins Swabey, D. C. L., by patent under the hand and seal of the archdeacon, dated the 15th of December, 1856. [A copy of this patent was \*annexed to and \*415] was to be taken as part of the case.]

The "Registrars," whose duties are partly indicated by their name. The plaintiffs hold this office "jointly and severally for their lives and the life of the survivor of them," by patent under the hand and seal of the archdeacon, dated the 11th day of April, 1853. [A copy of this document was annexed to and was to be taken as part of the case.] One of the registrars is a proctor in the Arches Court of Canterbury, and the other is an attorney of this Court. By the practice of the Ecclesiastical Courts, the presence of a registrar is necessary whenever any act is done by an ecclesiastial judge: see Canon 123.

The "Apparitor," who is the summoning officer of the Court. The present officer is Mr. Samuel William Maryon, and the office is usually

considered to be held at the pleasure of the archdeacon, and is sometimes conferred by deed. In this instance there was no written appointment.

By custom, churchwardens are chosen yearly, in Easter week, and are admitted into their office by the ordinary at his visitation shortly afterwards. In this archdeaconry it has been the custom for at least three centuries to hold two ordinary visitations in the year, at each of which the churchwardens have been required to make presentments: see Canons 116, 117, 118.

The archdeaconry of Colchester is divided into four districts or "calls," for which visitations are held yearly at the principal towns of Colchester, Walden, Kelvedon, and Halsted. The parish of Little Totham is comprehended, with thirty-nine others, in the Kelvedon call, to which alone reference will henceforth be made.

The following is the mode in which the business of the Court is conducted:—

\*Shortly after Easter in every year, a process is issued by the registrars, under the seal of the archdeaconry, addressed to all [\*416 clerks and literate persons whomsoever in and throughout the archdeaconry, appointing a day for holding the "Easter Visitation" in the parish church of Kelvedon, or occasionally in the neighbouring parish of Witham, and directing them to cite the churchwardens to attend. [A copy of the usual process was annexed to and was to be taken as part of the case.]

The process is delivered to the apparitor alone, who issues citations accordingly, which in special cases are personally served, but more frequently sent by the post. [A copy was annexed.]

Printed articles of inquiry (commonly called "presentment-papers") are prepared and forwarded by the registrar to the rural dean of each of the eighteen deaneries (see Canon 119). The rural dean arranges a time with the churchwardens of each parish when he shall inspect their church, and, in his presence, and in their own parish, the churchwardens fill up and sign their presentments, ready for delivery at the visitation. [A copy of the usual articles of inquiry was annexed.]

At the day appointed for the visitation, and before appearing at the church, the practice is, for the churchwardens to attend the registrar at an inn or other convenient place, where they are furnished by him with printed declarations of office, under the statute 5 & 6 W. 4, c. 62, s. 9, which they sign. [A copy of such declaration was annexed.] At the same time they pay the "procurations and synodals" claimed as due from the clergy to the archdeacon, as well as the fees claimed as due from themselves to the officers of the Court. [A copy of the usual receipt was annexed.]

At the appointed hour, the archdeacon, official, or \*surrogate [\*417 takes his accustomed seat in the church, attended by one of the registrars, and (after Divine service) the Court is formally opened, and the churchwardens of the several parishes are called over in rotation. The outgoing churchwardens appear, and deliver in their "presentment-papers," which are inspected by the Judge, and delivered by him to the registrar, to be filed. The registrar enters a minute in the visitation-book of the appearance of the churchwardens, as well as of

any special order, as to repairs or otherwise, which may be made by the Court.

At the same time, the churchwardens elect, who are in the majority of cases the old churchwardens rechosen, deliver in their "declarations of office," which are acknowledged before the Judge, and filed by the registrar, who also enters a minute of the fact in the visitation-book.

Another visitation is held shortly after Michaelmas in each year, before the official or his surrogate, the object of which is to ascertain whether the defects presented at the Easter visitation have been amended and the orders then given obeyed. Process is issued, citations and presentment-papers sent out, and the proceedings conducted in the same form as at Easter, except that the facilities of the post-office have of late years been made use of to obviate the personal attendance of the churchwardens in those cases in which they are able to make a satisfactory return. [Copies of the usual Michaelmas process, citation, and presentment-paper were annexed.]

The various duties before described occupy a large portion of time, and occasion a very considerable outlay in travelling and other expenses, clerks' salaries, printing, postages, and sundries. The registrars have no remuneration for such services, except certain fees called "visitation fees," which they claim as follows:—

\*418] \*At the Easter visitation,—for process and schedule, citation and service, act on appearance of outgoing churchwardens, articles of inquiry, presentment and filing, return of churchwardens elect and filing, act on appearance of churchwardens elect, declarations of office and filing, the sum of 7*s.* 6*d.* in the whole; out of which the sum of 2*s.* is due to the official, and 1*s.* to the apparitor.

At the Michaelmas visitation,—for process and schedule, citation and service, act on appearance of churchwardens, articles of inquiry, presentment and filing, the sum of 4*s.* 6*d.* in the whole; out of which 1*s.* is due to the official, and 1*s.* to the apparitor.

The plaintiffs are not liable to the official or to the apparitor for payment of any fees which they do not themselves actually receive.

The gross amount of visitation fees retained by the plaintiffs as registrars of the whole archdeaconry, is under the sum of 100*l.* per annum.

The claim for which the present action is brought arises under the following circumstances:—

On the 20th of May, 1857, a visitation, called the Easter visitation, was held, in the manner before described, at the parish church of Kelvedon, to which the defendants were cited, in the manner hereinbefore described as churchwardens of Little Totham. The defendant John Payne attended, and made and subscribed the statutory declaration, and was admitted into office for the ensuing year. The defendant Henry Quihampton did not appear when called on.

In respect of such visitation the sum of 7*s.* 6*d.* is claimed by the plaintiffs, and the payment thereof was at the time, and still is, refused by the defendants.

On the 26th of October, 1857, a visitation, called the Michaelmas \*419] visitation, was held for the whole archdeaconry, in the parish church of St. Peter, Colchester, to which the defendants were cited, with an intimation, that, "in case they were able to make a

satisfactory return through the post-office before the day of visitation, their personal attendance on that occasion would not be required." The defendants did not personally appear at such visitation: but the defendant Henry Quihampton signed and sent a presentment through the post, which was duly received and exhibited. [A copy of this document was annexed.]

In respect of such visitation, the sum of 4s. 6d. is claimed by the plaintiffs; and the payment thereof was and is refused by the defendants.

On the 31st of May, 1858, and the 27th of October, 1858, visitations were held in like manner in the parish churches of Kelvedon and St. Peter's, Colchester, respectively. The defendants did not appear at either of such visitations, nor did they sign or acknowledge any declaration of office: but at each of such visitations presentments were sent in and exhibited, signed by the defendant Henry Quihampton.

In respect of the visitations so held in 1858, the several sums of 7s. 6d. and 4s. 6d. are claimed by the plaintiffs; and the payment thereof was and is refused by the defendants.

On the 9th of June, 1859, and the 6th of December, 1859, visitations were held in like manner in the parish churches of Witham and St. Peter's, Colchester. The defendants did not appear at either visitation, nor did they sign or acknowledge any declaration of office: but, at the Michaelmas visitation, a presentment was received and exhibited, signed by the defendant Henry Quihampton.

In respect of the visitations so held in 1859, the several sums of 7s. 6d. and 4s. 6d. are claimed by the \*plaintiffs; and the payment thereof was and is refused by the defendants. [\*420]

On the 7th of June, 1860, a visitation was held, in the manner before described, at the parish church of Witham. The defendants were cited, and appeared: they exhibited their presentment, and made and subscribed their declarations of office, copies of which were annexed to the case.

In respect of such last-mentioned visitation, the sum of 7s. 6d. was and is claimed by the plaintiffs; and the payment was and is refused by the defendants.

All such fees are claimed by the plaintiffs,—first, as just and lawful fees settled by competent authority,—secondly, as ancient and accustomed fees due to them by virtue of their office,—and thirdly, as a reasonable compensation for work and labour done.

A table of fees is preserved in the registry, which is without date, but is in the handwriting of Philip Knightbridge, notary public, who was deputy registrar of the archdeaconry from the year 1721, to his death in the year 1745 or thereabouts, from which the following is extracted:—

	Judge.	Registrar.	Apparitor.
"For every citation of churchwardens to attend at an Easter visitation, setting out the book, act on appearance, and filing presentment, books of articles and oaths, for every, seven shillings and sixpence	2 0	4 6	1 0
"For every citation of churchwardens to attend at a Michaelmas visitation, setting out the book, act on appearance, and filing presentments, four shillings and sixpence	1 0	2 6	1 0

\*[A copy of the said table of fees was annexed, marked O, \*421] and was to be taken as part of the case.]

This table of fees does not bear the seal of the Court; nor is it authenticated otherwise than by being in the handwriting of the said Philip Knightbridge. It has never, within living memory, been hung up in any conspicuous place, but was found in a drawer in the Registry, with other miscellaneous papers.

No table of fees has, within living memory, been placed in the usual place where the Court is kept (no Court for contentious business having been held for many years), nor in the Registry in such sort as every man whom it concerneth may, without difficulty, come to the view and perusal thereof, and take a copy of them: (see Canon 136).

There are very numerous entries in the earlier visitation-books of the archdeaconry, showing generally the payment of fees by churchwardens at the several visitations, and amongst them are the following in which the particular amounts are specified:—

1719 (Oct. 28)	Birchanger . . . . .	Deb. 7s. 6d. pro festum Paschæ.
1727 (Dec. 4)	All Saints, Colchester . .	Sol. 4s. 6d. per Boyse.
1728 (Oct. 14)	All Saints, Colchester . .	{ Deb. Sol. feod. 12s.
1729 (April 17)	St. Botolph's, Colchester.	Sol. feod. 7s. 6d.
1730 (July 7)	Mount Bures . . . . .	Sol. feod. To Mand. 7s. 6d.
1735 (Oct. 23)	Berden . . . . .	Due 4s. 6d. for last Mich., which the churchwarden promises to pay next Easter.
1768 (July 9)	Little Wigborough . . . .	N. B. No appearance for three visitations past. In all, now due, with this, 1l. 4s. 0d.

And it appears from numerous memoranda endorsed on the original churchwardens' presentment-papers now remaining in the registry, that the fees of 7s. 6d. and 4s. 6d. mentioned in the table marked O \*422] were \*recognised as existing and payable at various periods anterior to the appointment of John Oxley Parker, hereinafter mentioned, and especially in the several years 1756, 1758, 1759, 1762, 1764, 1765, 1766, 1767, 1768, 1773, 1774, 1776. Such memoranda chiefly relate to cases in which the payments were in arrear, and for the most part show the payment of such arrears.

No entry or memorandum has been found in any of the visitation-books or presentment-papers of later date than the presumed compilation of the said table marked O, showing the payment or receipt of any visitation fees of less amount than the fees specified in such table.

It also appears to have been the uniform practice, at least as far back as the period last referred to, for the churchwardens to pay the usual fees, even when from illness or other causes they failed to attend the visitation. The instances thereof appearing in the visitation-books are very numerous, amounting to several hundreds.

It is shown by the fee-books of the said John Oxley Parker, who was deputy registrar of the archdeaconry from the year 1778 to his death in the year 1826, as well as by the original churchwardens' presentment-papers during that period, that, down to the year 1801, or thereabouts, the said John Oxley Parker received from the churchwardens of every parish in the archdeaconry, with few, if any, exceptions, the same fees as are mentioned in the table marked O.

But it appears that the said John Oxley Parker, in the years 1802, 1803, 1808, and 1814, made certain additions to or alterations in the said fees, as shown in the table hereinafter set forth.

On the death of the said John Oxley Parker, in 1826, his son Charles George Parker succeeded him as \*deputy registrar, and [\*428 held the office until his death, in 1847.

In the years 1841 and 1842, the said Charles George Parker made an addition of 1s. to the fees demanded at the Michaelmas visitation, as shown in the table hereinafter set forth. In other respects, and in other years, he adhered to the fees received by the said John Oxley Parker from 1814 to 1825.

No reason or ground appears for any of the changes made by the said John Oxley Parker and Charles George Parker respectively, further than is shown by a memorandum in the handwriting of the said John Oxley Parker, made at the Michaelmas visitation in 1808, to the following effect:—

“A. C. Presentments. I charged 5s., being an increase of 6d., on account of additional expenses of travelling,” &c. And there is nothing to show that the said John Oxley Parker and Charles George Parker, or either of them, had the authority of the archdeacons or officials, or the sanction or approval of the principal registrars for the time being, for any such increase.

On the death of the said Charles George Parker, the plaintiff John Shephard succeeded him as deputy registrar, and held that office till the death of Anthony Hamilton, clerk, the principal registrar, in 1851; since which time the plaintiffs have jointly acted as principal registrars.

The following table shows the visitation fees actually claimed and received from time to time since the date of the table of fees marked O, as evidenced by the visitation-books, fee-books, and presentment-papers before referred to, and corroborated by the churchwardens' accounts for several of the parishes in the Kelvedon call:—

Years.	Easter visitation.	Michaelmas visitation.	Yearly total.	Registrars and Deputy Registrars.
	s. d.	s. d.	s. d.	
1727 to 1744	7 6	4 6	12 0	Philip Knightbridge, deputy registrar.
1745 to 1758	7 6	4 6	12 0	James Lucas, deputy registrar.
1759 to 1777	7 6	4 6	12 0	James Taylor, deputy registrar.
1778 to 1801	7 6	4 6	12 0	John Oxley Parker, deputy registrar.
1802	8 6	4 6	13 0	.. ..
1803 to 1808	9 6	4 6	14 0	.. ..
1809 to 1813	10 0	5 0	15 0	.. ..
1814 to 1825	9 0	5 0	14 0	.. ..
1826 to 1840	9 0	5 0	14 0	Charles George Parker, deputy registrar.
1841 & 1842	9 0	6 0	15 0	.. ..
1843 to 1847	9 0	5 0	14 0	.. ..
1848 to 1851	9 0	5 0	14 0	John Shephard, deputy registrar.
1852 to 1856	9 0	4 0	13 0	{ John Shephard and Augustus Charles Voley, principal registrars.
1857 to 1860	7 6	4 6	12 0	

The older visitation-books have been examined, and contain numerous entries of sums differing in amount from any above set forth as charged and paid for visitation fees.

So far as any general results can be extracted, it appears that fees were claimed and paid from time to time as in the following table:—

Years.	Easter visitation.		Michaelmas visitation.		Yearly total.
	s.	d.	s.	d.	
1682	3	8	1	8	5 4
1697	5	0	3	0	8 0
1699	5	6	3	6	9 0
1700	5	0	2	6	7 6
1703	5	6	3	6	9 0

But various other charges occur, such as 4s., 1s., 6s. 6d., 4s. 6d., 3s. 4d., for which it is difficult to account, but which appear to stand, except in their comparative infrequency, on the same footing \*425] as the sums set forth in the preceding table.

It is, however, to be noticed in all the above instances, that the memoranda are made only in those cases in which, for some reason or other, the fees were not paid at the time. As regards the great majority of parishes, the visitation-books, which do not purport to contain any regular account of fees, are silent on the subject.

Moreover, there is nothing to show, at the period now referred to, whether or not the fees to the official and apparitor were included in the amounts charged, or whether or not they were separately received, or whether in fact any were charged or paid.

Going still further back, the visitation-books for the years 1587 and 1588 have also been examined. No entry or memorandum of any fees is to be found in the books for Easter, 1587, and Easter and Michaelmas, 1588. But, in that part of the book for Michaelmas, 1587, which relates to the Colchester call, there appears, in fifty instances out of sixty-two, an entry or mark of "4d." in the margin of the usual memoranda of the appearances of the churchwardens in that year; the said entry appearing in a part of the page corresponding to that in which the entry of fees owing is frequently found in the more modern books; in which latter no memorandum is usually entered of payments, but only of sums left unpaid and owing,—the entry being usually accompanied by the word "debet" or "debent."

It appears from the visitation-books, that at the Easter visitation in 1739, the churchwardens of the parish of Holy Trinity, Colchester, refused to pay the fees. The following are copies of the entries relating to the subject:—

\*426] "1739. May 2. Visitation held before the archdeacon and Dr. Strahan, his official.

"Boyse and Naggs churchwardens. Naggs appeared and exhibited.

"Naggs and Wayley elect. Sworn.. Refused to pay the fees, and are admonished to give their reasons in writing on or before the first Monday in July next.

"1739. July 2. Court held before the Rev. P. Morant, surrogate.

"Wayley appeared and delivered his reasons in writing. The surrogate continues this affair to hear the Judge's pleasure to next Court, the 27th day of August next.

"N.B. No Court held in August.

"1739. October 10. Visitation held before the Rev. P. Morant, surrogate. Naggs and Whaley, churchwardens, appeared and continued to hear the Judge's pleasure upon the churchwardens' reasons for not paying the fees of Court.

"1740. April 17. Visitation held before Dr. Strahan, official.

"Naggs and Wayley, churchwardens, appeared and exhibited.

"Both again, and sworn. They tendered 2s. for the oaths and other fees, but not otherwise specified, which was left, but not accepted of.

"1740. October 15. Visitation held before the Rev. B. Symson, surrogate. [Nothing appears.]

"1741. April 9. Visitation held before the archdeacon and Dr. Strahan, his official.

"Naggs and Wayley, churchwardens, appeared and exhibited.

"Wayley and Brockwell elect.

"1741. October 21. Visitation held before the Rev. P. Morant, surrogate. [Nothing appears.]

"\*1742. April 29. Visitation held before the archdeacon and Dr. Strahan, his official. [\*427]

"Wayley and Brockwell, churchwardens. Wayley appeared and exhibited.

"Brockwell and Mayhew elect, and Mayhew sworn.

"1742. October 13. Visitation held before the Rev. P. Morant, surrogate. [Nothing appears.]

"1743. April 14. Visitation held before Dr. Strahan, official.

"Brockwell and Mayhew, churchwardens. Mayhew appeared and exhibited.

"The same and Clarke elect, and Mayhew sworn.

"1743. July 17. Court held before the Rev. P. Morant, surrogate.

"Clarke appeared and was sworn.

"1723. October 19. Visitation held before the Rev. P. Morant, surrogate.

"Brockwell, Mayhew, and Clarke, churchwardens. Fees paid by Mr. Morant."

It appears further from very numerous entries in the churchwardens' account-books of the parishes of Great Totham, Little Totham, and Goldhanger, in the Kelvedon call, that, besides the fees which were taken by the registrars between 1727 and 1820, a fee, generally of 1s., was commonly paid to the apparitor. The practice appears to have been at this time for the apparitor to be paid a fee of 1s. at the time of serving the citation on the churchwardens, usually a few days before the visitation took place. The entries of such payments "to apparitor for a citation," or "for a citation to Kelvedon," or "to the archdeacon's visitation," immediately followed by the payment of "visitation fees," "presentment fees," "Court fees," or "proctor's fees," are very numerous. Similar entries appear between the years 1801 and 1817, in the account-books of the churchwardens of Pattiswick, Bradwell, and \*Virley, which commence in the years 1797, 1805, and 1811, respectively. They are interspersed with numerous entries of fees paid to the apparitors, of much larger and varying amounts; and entries of the latter class appear frequently in the account-books of the above-mentioned parishes after the year 1820: but it is impossible to tell from the entries for what such fees

were charged or paid, although it is alleged that the apparitors at that time performed duties from which they are now relieved. But the registrars for the time being had no interest in or control over the charges of the apparitors.

No entries appear in any of the visitation-books or books of account, or in any of the churchwardens' accounts, of any mention of any fee paid directly by the churchwardens to the official. But the fees due to the official and the apparitor respectively have always been accounted for to them by the registrars.

The duties performed by the registrars, as before set forth, are analogous to the duties performed in petty session by clerks to justices of the peace in relation to other parish officers, that is to say, overseers, surveyors, and constables.

The fees paid by statute to the clerk to justices of the division within which the defendants' parish of Little Totham is situate, for the performance of the ordinary duties of his office in relation to overseers of the poor, amount to 13s. 6d. per annum. Those in relation to surveyors of the highways amount to 10s. per annum. And those in relation to parish constables to 9s. 6d. per annum. Such fees were actually received by him during the period referred to in this case, viz., from 1857 to 1860.

The following canons are considered to have a bearing on this question:—

Canon 89. The choice of churchwardens, and their accompt.

\*429] \*Canon 90. The choice of sidesmen, and their joint office with churchwardens.

Canon 116. Churchwardens not bound to present oftener than twice a year.

Canon 117. Churchwardens not to be troubled for not presenting oftener than twice a year.

Canon 118. The old churchwardens to make their presentments before the new be sworn.

Canon 119. Convenient time to be assigned for framing presentments.

Canon 123. No act to be sped but in open Court.

Canon 135. A certain rate of fees due to all ecclesiastical officers.

Canon 136. A table of the rate of fees to be set up in Courts and registries.

A copy of the table of fees referred to in the 135th Canon, and known as Archbishop Whitgift's table of fees, was annexed to and was to be taken as part of the case.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover from the defendants the before-mentioned sums of 7s. 6d., 4s. 6d., 7s. 6d., 4s. 6d., 7s. 6d., 4s. 6d., and 7s. 6d.,—making together 2l. 3s. 6d.,—or any or either of them, or any part of them respectively. And the Court was to be at liberty to draw inferences of fact.

If the Court should be of opinion in the affirmative, then judgment was to be entered up for the plaintiffs for the whole or such part of the said sum of 2l. 3s. 6d. as the Court should order. If the Court should be of opinion in the negative, then judgment of nolle prosequi was to be entered up for the defendants.

It was agreed, that, in any event, no costs should be paid by the plaintiffs to the defendants or by the defendants to the plaintiffs.

\**Coleridge*, Q. C. (with whom was *Hannen*), for the plaintiffs, (a) [\*480 contended,—first, that the Courts of the archdeacon are ancient recognised Courts, with registrars as ancient recognised officers belonging to them,—secondly, that, in such Courts, the officers performing the work are entitled to be paid by fees for the work done,—thirdly, that such fees may be recoverable either as fees settled by proper authority, fees ancient and accustomed, or fees affording a quantum meruit for the work performed,—fourthly, that these fees were all three: and that the additions made between 1802 and the time the present plaintiffs come into office did not take away their right to the ancient fees, and that such fees were reasonable, regard being had to the work done.

He referred to the following authorities:—Co. Litt. 44 a, 368 b, 4 Inst. 239, 2 Rol. Abr. 285, 645, Comyns's Digest, *Courts* (N. 9), *Ecclesiastical Persons* (C. 5), *Prescription* (E. 1), *Prohibition* (F. 4), Bacon's Abridgment, *Courts Ecclesiastical* (A. 8), *Fees* (A.), *Office* (N.), *Prerogative* (D. 2), *Prohibition* (L. 1), Burn's Ecclesiastical Law, *Courts*, §§ 3, 7, *Visitation*, 24, Godolphin's Abridgment (ed. 1687), Ch. 8, §§ 1, 2, 4, 7, Ch. 10, §§ 7, 21, Lyndwood 49, 50, Stillingfleet, Vol. 1, p. 236, Dr. Cardwell's Documentary Annals, Vol. 1, pp. 92, 145, 164, Vol. 2, p. 33, Dr. Trevor's Case, 12 Co. Rep. 78, *Ridley v. Pownell*, 2 Levinz 136, *Pollard v. Gerard*, 1 Ld. Raym. 703, 1 Salk. 333, Lord Holt 596, 12 Mod. 608, *Goslin v. Ellison*, 1 Salk. 330, \**Johnson v. Lee*, [\*431 5 Mod. 238, *Pitts v. Evans*, 2 Stra. 1108, *Saunderson v. Clag-* get, 1 P. Wms. 657, 1 Stra. 421, and the statutes 21 H. 8, c. 5, 37 H. 8, c. 17, and 58 G. 3, c. 45, ss. 84, 85. He also referred to the following Canons,—26, 53, 57, 76, 90, 109, 110, 111, 112, 113, 115, 116, 117, 118, 119, 121.

A. *Wills* (with whom was *Bushby*) for the defendants, (b) did not deny that the archdeacon's Court was a well-recognised Court, or that the registrar thereof was a well-recognised officer, having recognised fees: but he contended that there was no usage to justify the fees here claimed. He referred to 2 Inst. 533, Gibson's Codex 569, Lyndwood 49, 52, 53, 114, 6th Decretal, B. 3, Tit. 20, ch. 1, Bacon's Abridgment, *Fees* (A.), pl. 1, 4 Burn's Ecclesiastical Law 26, 35, Kennett's Parochial Antiquities, Vol. 2, pp. 248, 353, 364, 369, 1 Stephen's Laws of the Clergy 227, *The Bishop of St. David's v. Lucy*, 1 Salk. 134, *Veale v. Prior*, Hardres 351, *Goslin v. Ellison*, 1 Salk. 330, *Gifford's Case*, 1 Salk. 333, *Johnson v. Lee*, 5 Mod. 231, *Burdeaux v. Lancaster*, 1 Salk. 232, *Middleton v. Crofts*, 2 Atk. 650, 2 Stra. 1056, *Fleetwood v. Finch*,

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"That the plaintiffs are entitled to recover the sums of money claimed,—first, as just and lawful fees settled by competent authority,—secondly, as ancient and accustomed fees due to them by virtue of their office,—thirdly, as a reasonable compensation for work and labour done."

(b) The points marked for argument on the part of the defendants were as follows:—

"First, that the fees claimed could be due only by virtue of a uniform and immemorial custom, or upon a quantum meruit, on the ground of work being done at the request of the defendants,—secondly, that the facts stated in the special case showed that no uniform or immemorial custom has ever existed,—thirdly, that the facts negated any notion of a request by the defendants."

2 H. Bla. 220, *Cooper v. Byron*, 3 Y. & C. 467,† *Spry v. Gallop*, 16 M. & W. 716.†

*Cur. adv. vult.*

WILLES, J., delivered the judgment of the Court:—This is an action brought by the persons filling the \*office of registrar of the Archdeaconry Court of Colchester, in the diocese of Rochester, to recover certain fees alleged to be payable to them by the churchwardens of the parish of Little Totham, within the archdeaconry, in respect of their office of registrar, upon the Archdeacon's visitations of the parish at Easter and Michaelmas, in 1857 and the two following years, and at Easter, in 1860.

The duties of the registrar were in all instances except the last performed, so far as they could be, without the actual attendance of the churchwardens, and in the last instance they were completely performed.

The claim, to be valid, must be founded upon immemorial usage; and the fees in question have been paid and received for so long a time and up to so recent a period, that, according to the ordinary rule of evidence applicable to long and continuous modern user of a right capable of a legal origin, the immemorial receipt of such fees ought to be presumed, if they could have had such an origin. We must consider the objections made to them by the defendants *seriatim*.

First, as to the nature of the office of registrar,—The case finds in effect that it is an office with duties of a continuous and presumably perpetual character, held for an estate of freehold, and that its existence is essential to the due exercise of some of the functions of the archdeacon. It is therefore one to which fees may be annexed by immemorial usage.

Next, as to the evidence of such usage,—The origin of the payment does not precisely appear. There is some evidence beginning in the sixteenth century, not very clear as to the earlier period, of payment of some fees by the churchwardens to the registrar. Such payments before the eighteenth century were of less amount than the fees now claimed. There is ample \*evidence to show, that, from a time not later than 1727, to the period of the present dispute, fees of equal or greater amount than those now claimed, and in respect of the same services, have been paid, and, except in one instance (in 1739), not disputed. In the course of this latter period the amount was raised, first in 1801, and afterwards in 1841. Mr. *Wills*, in his able argument for the defendants, placed much reliance upon these variances in the amount paid, as establishing a breach in the evidence of usage, and as proving that the claim was founded upon a gradual usurpation. He also argued, that, considering the increase in the value of money since the epoch of legal memory, the claim was rank. This reasoning, however, if applicable to such a fee, is not conclusive of the present case; for a fee need not be of a fixed and ascertained, but may be of a reasonable amount; and, exercising the power conferred upon us by the case, to draw inferences of fact, we may conclude, that, if the claim can be sustained in point of law, it was in fact for a reasonable fee. If so, then, looking to the amount established for similar services by other officers, and remembering what fees have been paid and received within the memory of us all in the Courts of Westminster Hall and at the Assizes, we think there can be little

doubt that the fees in question, so far as amount is concerned, are in fact reasonable.

With respect to the objection founded upon the plaintiffs' claim being for services actually rendered,—The services in respect of which the fees are payable were rendered so far as the plaintiffs could, and as the defendants thought proper to accept them. Some service was actually rendered; and the plaintiffs were ready and willing to do all that belonged to their office. It appears in evidence, that, during more than a century, and presumably from time immemorial, "it \*has been the uniform practice for the churchwardens to pay [\*434 the fees even when from illness or other causes they failed to attend the visitation;" and that the instances thereof appearing in the visitation-books are very numerous, amounting to several hundreds: so that the fee, according to the usage, is payable in respect of the services of the registrar so far as they have been performed, the registrars being in their place ready and willing to perform all the duties of their office. This view renders it unnecessary to consider how far the fees in question might be claimed in respect of simple readiness and willingness to render the services, as in Lord Falmouth's Case, and others, to which we only advert, lest it should be thought that the point had escaped notice.

As to the persons called upon to pay,—When we consider the period at which the fees must have been introduced, and the nature of the office of churchwardens, we can feel no surprise at finding that the burthen was imposed in the first instance upon those functionaries. The churchwardens represent the parish, in respect to the custody of its property and the care of the fabric of the church; and they are bound to make presentments, inter alia, respecting the state of the fabric of the church, to the archdeacon (who is oculus episcopi) at his periodical visitations. We are not at liberty to assume the function of legislators, or to take into account the changes which diversity of opinion has brought about. What we are principally to consider, is, whether these fees could have had a legal origin; and, in doing so, to give weight to the considerations which doubtless prevailed in those early times to which the origin of the claim must be traced. The visitation of the archdeacon must, for this purpose, be considered as for the benefit of the parish at large, and, amongst others, of the \*churchwardens themselves, the performance of whose duties, [\*435 besides, is facilitated by the services of the registrars. It was not unreasonable that those who might receive the benefit should share in the expense of the visitation; and it is in accordance with the history of like visitations, that the expenses should be borne by those who are visited. It is not alleged or shown that the churchwardens are without funds or the means of reimbursing themselves. Even if they were in such a condition, it does not follow that they could evade the burthen. But upon this we are not called upon to give an opinion.

Another objection was said to be founded upon the Constitutions of Archbishop Langton and others, cited from Lyndwood; and it was, that the visitation ought to have been made in each parish individually; and that a visitation such as that held in the present case, in one parish, for that and thirty-nine others collectively constituting with it

one district or call, was a violation of such constitutions, out of which no legal claim could arise. In considering this objection, we must bear in mind that the visitations have been held in the same manner as now for at least three centuries. The practice has been, instead of visiting each parish individually, to divide the archdeaconry into districts, and to hold the visitation for all the parishes of a district at some one parish church within that district. The obvious reason for this course was, to avoid delay and expense. The place at which the visitation is held is in each instance within the jurisdiction of the archdeacon. It does not appear that any other course has ever been followed within this diocese. It may be that the Constitutions are considered as substantially complied with by such visitations, conjoined with the exercise of the functions of the rural deans. But, however \*436] this may be, the objection which, having \*regard to the practice of the last three centuries, may be thought tardy, savours more of spiritual than temporal cognisance, and cannot prevail to defeat a claim founded upon immemorial usage, which confers a temporal right to be enforced in a Court of common law.

This latter remark is also applicable to the objection founded upon Canons 135 and 136 of the collection of 1603, and Archbishop Whitgift's table of fees; as to which it is only necessary to say, that, when closely considered, the Canon and table will be found to deal only with fees received at the consistory or place at which the Court Christian is ordinarily held, in respect of the business ordinarily transacted there, and that they do not touch the subject of visitation. It might as well be said that the Canons had abolished the archdeacon's procurations, as his officers' lawful fees. In construction, they do not touch the point. If they did, then, inasmuch as the Canons of 1603, *proprio vigore*, do not bind the laity, they could not destroy a customary right.

We think that none of the objections thus raised can in point of law be sustained; and, as a continuous receipt of the fees has been proved for a period so long that we ought to presume their immemoriality, the claim of the plaintiffs is made out, and the judgment of the Court must be in their favour. Judgment for the plaintiffs.

\*437]

\*HORTON v. MABON. April 30.

The application of a known article to a purpose analogous to those to which it had before been applied, is not the subject of a patent,—although the result of its application to the new purpose may be the production of a known machine in a cheaper or better manner.

For instance, the application of "double angle-iron," a well known article, to the formation of hydraulic cups or joints to telescopic gasholders, instead of forming them, as had theretofore been done, by riveting two pieces of *single angle-iron* to a plate.

THIS was an action for an alleged infringement of the plaintiff's patent for "Improvement in the construction of gasholders." The plaintiff claimed damages, and also an injunction and an account.

The defendant pleaded,—first, not guilty,—secondly, that the plaintiff was not the first and true inventor of the said supposed new manufacture, as alleged,—thirdly, that the said supposed invention

was not a new manufacture as alleged,—fourthly, that Her Majesty did not by the said letters patent make such grant, as alleged,—fifthly, that the plaintiff did not within six calendar months next after the date of the said letters patent cause to be enrolled in the Court of Chancery an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed, as alleged. Issue.

The cause was tried before Erle, C. J., at the sittings in London after last Michaelmas Term. The letters patent, bearing date the 2d of January, 1851, were put in. The specification, which was dated the 1st of July, 1851, described the invention as follows:—

“My invention of ‘Improvements in the construction of gasholders’ relates,—Firstly, to a novel construction and arrangement of guides of telescopic gasholders, whereby the movable parts of such gasholders are or may be guided in a vertical direction as the volume of gas in the gasholders increases or diminishes, and it becomes necessary to increase or diminish the capacity of the gasholder. According to the plans now in use for effecting this object, it is found necessary at a great expense to erect a high guide framing, which is required to have a greater elevation than the \*topmost part of the side of [\*438 the inner gasholder when it is raised to its highest working point. By means of my improvement, a very considerable economy in the construction of the guide framing for telescopic gasholders is effected, inasmuch as the columns and guides I employ do not require to be more than about half the height of those usually employed. In my improved arrangement, a series of vertical guides attached to posts or columns is set round the tank of the gasholder in the usual manner, except that my columns are not so high as the ordinary ones. The posts or columns may be braced together at the top with circumferential tie-rods; and friction-bowls or rollers are adapted to different suitable parts of the gasholder and its attachments, and are arranged so that they or some of them may work vertically against the vertical guides attached to the posts or columns which are set round the tank, while other antifriction guides or rollers are made to work against bars, plates, or rails adapted to the other parts of the gasholder or of the tank, so as to keep the parts separate and in a vertical position, and also prevent them from jamming or sticking while moving up or down.

“The second improvement consists in adapting to the outer or inner sides of gasholders vertical fixed bars or rails, which will present an even surface suitable for receiving the pressure of the antifriction guide-rollers of the respective parts of the gasholder, whereby the inconvenience arising from the use of loose bars will be prevented.

“My third improvement consists in forming the top and bottom of the water-cup or hydraulic joint of gasholders of sheet or plate iron wrought to the shape required for such parts, instead of using angle-iron and sheet-iron bolted or riveted together, which renders the manufacture more costly.

\*“In order, however, that my several improvements may be more clearly understood, I have in the accompanying drawings [\*439 shown various views of the several parts of the improved gasholder, and the operation thereof.”

[Here followed a description of the drawings, the only material part of which, as applicable to this case, was as follows,—“The peculiar mode of constructing the hydraulic cup, valve, or joint, which forms the third part of my invention, will best be understood by referring to figures 3 and 4, which are drawn upon an enlarged scale. Instead of forming the cup or valve of sheet or plate iron, with angle-iron at the corners, as is the ordinary mode, I make a cup *k k* of wrought-iron, and secure it at one side by rivets to the gasholder, and on the other side in a similar manner to a strip *l* of sheet or plate iron, in order to form the other side of the cup or valve. By this means, as the rivets on the top and bottom of the cups are dispensed with, and only one row of rivets on each side is required, a great economy in the construction of gasholders is effected.”]

“I would here observe that my improvements may, if required, be used separately, as, for instance, the mode just described of constructing the hydraulic cup or joint of gasholders may be adapted to and employed in conjunction with the ordinary mode of mounting and working gasholders: on the other hand, the first-described improvements, viz. the novel arrangement and construction of guides, guide-frames, and rollers and plates or bars, may be employed without adopting the improvement in the construction of the hydraulic valve.

“Having now described my several improvements, and the best means with which I am acquainted for carrying the same into effect, I \*440] would observe in \*conclusion that I do not mean or intend to confine myself rigidly to the precise arrangement or construction of parts herein shown and described, as they may perhaps be varied without departing from the nature and object of my invention; but that which I consider to be new, and therefore wish to claim as the invention secured to me by the hereinbefore in part recited letters patent, is,—

“First, the use and application of vertical travelling guide standards fixed to the lower or outer gasholder, to which guide standards anti-friction-rollers, wheels, or pulleys are adapted, so that they may work against other vertical guides or plates, as the parts of the gasholders rise and fall with the increase or diminution of the quantity of gas contained therein, and by that means the several parts of the gasholder may be kept in a vertical position and made to work easily.

“Second, I claim the use and application of the fixed guide-roller bars or rails *b b* (instead of loose bars, as is usual), such fixed guide-bars, plates, or rails being riveted to and forming part of the gasholder, and against which the antifriction rollers *d d* or *f* work, as shown and described.

“I claim, third, the mode herein shown and described of constructing the hydraulic cups or joints of gasholders, or any other mere modification thereof, in which the top or bottom of the hydraulic joint or valve is formed of plates of iron made or bent into a cup shape, so as to admit of the valve being made complete and attached to the gasholder without the necessity of employing angle-iron and double sets of rivets, as is usually the case.”

Witnesses were called on the part of the plaintiff, who professed to be acquainted with gas-works, and who stated that the hydraulic joint or cup described in the specification was to the best of their know-

ledge \*and belief a new invention; that a workman of ordinary skill could construct the thing from the description; that the water-cup or hydraulic joint is an essential part in the kind of gas-holder called the telescopic gasholder; that, previously to the date of the plaintiff's patent, those cups or joints were constructed of angle-iron in three pieces made to the curve of the gasholder, and fastened together with rivets,—with four joints and four rows of rivets; that, by the plaintiff's invention, two sets of rivets were dispensed with, and consequently the article was made cheaper and better and with greater facility, and with considerable saving in the weight of metal used.

On the part of the defendant, it was submitted that the alleged improvement was not a new manufacture which was properly the subject-matter of a patent.

His lordship, yielding to the objection, directed the jury to find for the defendant,—reserving the plaintiff leave to move to enter the verdict for him, if the Court should think the objection not well founded.

*Bovill*, Q. C., in Hilary Term last, accordingly obtained a rule nisi to enter a verdict for the plaintiff, with nominal damages, and costs, pursuant to the leave reserved, “on the ground that the patent was valid, and that the invention as described in the specification was new and a good subject-matter for a patent.” He referred to *Harwood v. The Great Northern Railway Company*, 6 Law Times, N. S. 190, 29 Law J., Q. B. 193.

*Grove*, Q. C., and *Hindmarch* now showed cause.—If the specification includes double angle-iron, it is clearly bad, double angle-iron being an article well known and in common use for a variety of cognate purposes,—for cisterns, reservoirs, fermenting-vats, &c., \*though it had never in fact been used in the construction of gasholders. In *Brook v. Aston*, 8 Ellis & B. 478 (E. C. L. R. [\*442— vol. 92), a patent was taken out in 1853, for, amongst other things, improving the texture of the threads of cotton and linen yarns, by exposing the threads in a distended state to the action of beaters, the effect of which was, to polish the sides of the threads and produce smoothness and a glacé effect. In 1856, the plaintiffs took out a patent for, amongst other things, an improvement in the finishing yarns of wool or hair, by exposing their threads in a distended state to the action of machinery which, it was admitted, was substantially the same as the machinery described in the patent of 1853. The claim in the plaintiffs' specification was, amongst other things, to the invention of “causing yarns of wool or hair whilst distended and kept separate to be subjected to the action of rotatory beaters or bur-nishers, whereby the fibre is closed and strengthened, and the surface effectually polished.” On the trial of an action for the infringement of the plaintiffs' patent, it was proved that the process of the patentees of 1853 had not previously been applied to wool or hair; and evidence was given that the effect upon wool was not the same as upon linen. It was held, by the Court of Queen's Bench, (a) that the plaintiffs' specification claimed what was merely the application of the old machinery in the old manner to an analogous subject, and was not

(a) Affirmed on error, 28 Law J., Q. B. 175.

the subject-matter for which a patent could be claimed, and, consequently, that the plaintiffs' patent was wholly void; though it would have been otherwise if the claim had shown any novelty or invention in the mode of applying the old machinery to the new purpose. "It may well be," said Lord Campbell, "that a patent may be valid for \*443] the application of an old invention to a new purpose; but, to make it valid, there must be some novelty in the application.

\* Here there is none at all. / We may suppose that the specification of 1853, instead of extending to cotton and linen yarns, had been confined to cotton yarns only. Could, in that case, a new patent have been supported for applying the same process precisely to linen threads? It is clear it could not. In all the cases in which a patent has been supported, there has been some discovery, some invention. It has not been, as in this case, merely the application of the old machinery in the old manner to an analogous substance. That cannot be the subject of a patent." [WILLES, J.—The present is a much weaker case than that of *Harwood v. The Great Northern Railway Company*, 29 Law J., Q. B. 193, 6 Law Times N. S. 190.] It is so. / In that case, letters patent were granted for an alleged invention of fishes and fish-joints for connecting the ends of railway rails. The fishes were made of iron, with a groove in the outer surface for the purpose of preventing the square heads of the bolts passing through them and the rail from turning round, and also for the purpose of procuring greater strength with an equal weight of metal than would have been obtained from a fish of the same thickness throughout. Before the letters patent were granted, grooved iron with bolts had been used for the purpose of fastening timbers placed vertically upon one another, or placed horizontally side by side; and a channelled plate which had been used for the purpose of supporting the flooring of a bridge, and which ran longitudinally the whole length of the bridge, was also used for the purpose of fishing a scarf-joint where the ends of the two timbers met together, but it was not used either with a view of fixing the heads of the bolts or of obtaining \*greater strength with an equal amount \*444] of metal. And it was held by the Exchequer Chamber,—reversing the judgment of the court below,—that the use of grooves in pieces of iron for holding materials together by means of bolts and nuts had been given to the world, together with all its advantages, before the date of the plaintiff's patent; that the plaintiff's alleged invention was a new application of an old contrivance in the old way to an analogous subject, without any novelty or invention in the mode of applying such old contrivance to the new purpose, and that such application was not a valid subject-matter of a patent. / In *The Queen v. Cutler*, 1 Macrory's P. C. 124, 138, it was held that the application of a known article to a new use, the mode of application not being new, but having before been used in applying analogous articles to the same purpose, is not a manufacture within the meaning of the statute of James, and cannot be made the subject of a patent. There, the specification of a patent for "improvements in the construction of the tubular flues of steam-boilers," claimed the application of iron tubes coated with brass to form such flues; the tubes themselves were not new, neither was the mode of applying them so as to form flues new, having been before used in the application of uncovered tubes to

a similar purpose: and it was held that the patent could not be sustained.

*Bovill*, Q. C., and *Webster*, in support of the rule.—The plaintiff's invention consists in an improved mode of constructing the hydraulic joints or cups of telescopic gasholders, with beneficial results to the public, by the production of an improved article at a diminished price. There are numerous authorities to show that that may be the subject of a patent. The value of an invention frequently consists in the substitution \*of a simple for a more complex mode of applying known materials to produce a known result. Before Watt's [\*445 invention, it was known that you might condense steam by means of cold water, and this was done in the cylinder itself: yet nobody has ever doubted that Watt, by introducing a mode of condensing the steam in a separate chamber, was the inventor of a valuable improvement which was properly the subject of a patent: *Boulton v. Bull*, 2 H. Bl. 463; *Hornblower v. Boulton*, 8 T. R. 93. [WILLES, J.—No new effect is produced by the alleged invention here; the only result is the production of a gasholder with less labour and expense.] In *Crane v. Price*, 5 Scott N. R. 339, 4 M. & G. 580 (E. C. L. R. vol. 43), 1 Webster P. C. 395, the plaintiff took out a patent for the application of anthracite or stone-coal combined with a hot-air blast in the smelting or manufacture of iron from iron-stone mineral or ore. The use of the hot-blast was already the subject of a former patent granted to one Neilson, and was used by the plaintiff under a license from him; but the combination of the hot-blast with the use of anthracite in the smelting of iron was new, and the result appeared to be a larger yield at a smaller cost, and a better quality of iron than under the former process by means of the combination of hot-blast with coke from bituminous coal. And it was held that this new combination was a "manufacture" within the meaning of the statute of James. Tindal, C. J., in delivering the judgment of the Court, there says: "The question is, whether, admitting the use of the hot-air blast to have been known before in the manufacture of iron with bituminous coal, and the use of the anthracite or stone-coal to have been known before in the manufacture of iron with the cold-blast, but that the combination of the two together,—the hot-blast and the anthracite,—was not known to be \*combined before in the manufacture of iron, such [\*446 combination can be the subject of a patent. And we are of opinion, that, if the result produced by such combination is either a new article, or a better article, or a cheaper article to the public than that produced before by the old method, such combination is an invention or a manufacture intended by the statute, and may well become the subject of a patent. Such an assumed state of facts falls clearly within the principle exemplified by *Abbott, C. J.*, in *The King v. Wheeler*, 2 B. & Ald. 349; and it falls also within the doctrine laid down by Lord Eldon in *Hill v. Thompson*, 3 Meriv. 629.(a) There are numerous instances of patents which have been granted where the invention consisted in no more than in the use of things already known, the acting with them in a manner already known, the producing effects already known, but producing those effects so as to be more

(a) And see 2 J. B. Moore 624 (E. C. L. R. vol. 4), 8 Taunt. 375 (E. C. L. R. vol. 4), Holt N. P. C. 636 (E. C. L. R. vol. 3).

economically or beneficially enjoyed by the public." [WILLES, J.—The only ground upon which that case can be upheld, is, that the product was a materially better article.] And cheaper. [WILLES, J.—Cheaper by reason of the invention.] *Crane v. Price* was cited without disapprobation in *Dobbs v. Penn*, 3 Exch. 427.† In *Russell v. Cowley*, 1 C. M. & R. 864,† 1 Webster P. C. 465, it was held that a different mode of attaining the same object,—as, welding by means of fixed dies instead of rollers, or welding by the omission of a maundril previously in use,—is a good subject-matter of a patent. The dispensing with two rows of rivets here is as much an improved manufacture as the dispensing with the maundril in that case; and the result is equally the production of a better and cheaper article. *Derosne v. Fairie*, 2 C. M. & R. 476,† 1 Webster P. C. 158, is also an authority to show \*447] that there may be a valid patent for the application of a known material to produce a new and useful result. Who is to determine the amount of invention which will sustain a patent? [ERLE, C. J.—The product here is precisely the same: there is some saving of expense in the use of double angle-iron; that is all. If it could be shown that no such good gasholder as Horton's had ever been made before, possibly I should have felt disposed to sustain his patent.] It is better, by reason of the saving of a double row of rivets. In *Steiner v. Heald*, 6 Exch. 607,† it appeared that prior to the date of the plaintiff's patent, granted to him in 1843, madder dye had been obtained from fresh madder by the application of hot water, but there still remained in the dye-vats a residuum called "spent madder," which was well known to contain some colouring matter, but which had never been extracted from it, and the "spent madder" was consequently thrown away as useless. Some time previous to the plaintiff's patent, a process was discovered, which, by the application of hot water and acid to fresh madder, produced a dye called garancine, which possessed different properties to the old madder dye. This process exhausted the whole of the colouring matter from the fresh madder. The plaintiff by his patent claimed the application of this process to "spent madder," whereby he obtained garancine, and the "spent madder" thereby became of much value. It was held, on error from the Court of Exchequer, that, as "spent madder" might be in its nature and properties the same as or different from "fresh madder," it did not follow as matter of law that the plaintiff's patent was void; but that it was a question of fact for the jury whether the plaintiff's invention was a new manufacture of garancine. In *Booth v. Kennard*, 1 Hurlst. & N. 527,† Erle, J., refers, in the course of the \*448] argument, to *Steiner v. Heald*: and Cockburn, C. J., in delivering the judgment of the Court, says,—“The patent claims the making gas directly from seeds and other oleaginous substances, instead of making it from oils. By this means, the patentee gets rid of one of two processes. Previously to the date of the patent, gas had been obtained by a particular apparatus from oils which were first separated from the substances containing them by pressure. The patentee has discovered that the first process may be dispensed with. That is a useful invention, and the patent is sustainable if the invention is new. That, like *Russell v. Cowley*, was a mere omission of one of two processes in order to produce the same result in a manner

more beneficial to the public, because cheaper. [WILLES, J.—Making a known thing by means of known materials cannot be the subject of a patent, although the thing is produced at a less cost.] In *Betts v. Menzies*, 30 Law J., Q. B. 81, the plaintiff obtained a patent for a new manufacture of a material to be employed in making capsules, and for other purposes, consisting of combining lead with tin, by covering the lead with tin on one or both surfaces, and reducing the combined metal into thin sheets suitable to the purpose to which it was to be applied. The mode of working described in the specification was, by casting the lead and the tin into ingots, rolling each of the metals separately, the lead to about one quarter of an inch, the tin to about one-twentieth the thickness of the lead, whatever that thickness might be, then rolling both the lead and tin together with considerable pressure, so as to make the metals adhere to each other, passing the strip of conjoined metal several times through the rollers, to make the adhesion more complete, and to reduce it to the required thickness for the manufacture of capsules. The specification [\*449] went on to say that the new compound material might be applied for other purposes stated: it did not show in what proportions the lead and tin were to be combined for those purposes, nor did it state that the proportion of about one to twenty was essential. The specification stated that the plaintiff claimed as the invention, first, the manufacture of the new material, lead combined with tin on one or both its surfaces by rolling or other mechanical pressure, as therein described, secondly, the manufacture of capsules of the new material of lead and tin combined by mechanical pressure as therein described. In 1804, one Dobbs obtained a patent for an invention of plating, coating, or uniting lead with tin, and also their various alloys or mixtures, which he denominated "Albion metal," and applied to the manufacture of cisterns, &c. His mode of coating the lead or alloyed lead with tin, was, by taking a plate or ingot of lead or alloyed lead, and a plate of tin or alloyed tin, of equal or unequal thicknesses, and, their surfaces being clean, passing them between the rolls of a flattening or rolling mill so as to make the metals cohere. He passed them several times through the mill, if necessary, until a sufficient degree of cohesion was obtained. It was found by the jury that the new metal of lead coated with tin had been produced by pressure previously to the plaintiff's patent, but that it had never been made for public use or sold by a manufacturer in the way of his trade. It was held by Pollock, C. B., Martin, B., Bramwell, B., and Channell, B., that the plaintiff's patent was void for want of novelty, on the ground that Dobbs's prior patent disclosed the same invention; and by Williams, J., and Willes, J., that the plaintiff's patent was good, and not invalidated by Dobbs's,—since Dobbs's patent was practically incapable of being carried into effect. But nobody ever suggested that it was not a new manufacture. The assumptions upon which the judgment in [\*450] *Harwood v. The Great Northern Railway Company*, 29 Law J., Q. B. 193, proceeded, make that case inapplicable here. It proceeded on the ground of want of novelty in the invention: the fishes had before been applied to wood, though not to iron. [WILLES, J., referred to *The Patent Bottle Envelope Company v. Seymer*, 5 C. B. N. S. 164 (E. C. L. R. vol. 94), where it was held that the application of a

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well-known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent.]

ERLE, C. J.—I am of opinion that this rule should be discharged. The whole claim of the plaintiff consists in the application of a known article to a purpose analogous to those to which it had before been applied; and that, in my opinion, is not the proper subject of a patent. The claim is for a “mode of constructing the hydraulic cups or joints of gasholders, or any other modification thereof, in which the top or bottom of the hydraulic joint or valve is formed of plates of iron made or bent into a cup shape, so as to admit of the valve being made complete and attached to the gasholder without the necessity of employing angle-iron and double sets of rivets, as is usually the case.” It is in fact a claim for the application of double angle-iron to the formation of hydraulic joints to telescopic gasholders. Now, telescopic gasholders were well known, hydraulic joints were well known, and double angle-iron was also well known, and had been before applied to a great number of cognate purposes. In none of these was there any improvement. But it appears that those who had heretofore constructed telescopic gasholders formed the hydraulic joints by riveting two pieces of angle-iron to a plate which formed the top or bottom \*451] of the \*cup. It was perfectly apparent and palpable that double angle-iron would answer the same purpose, and save two rows of rivets, and consequently much additional labour. The whole claim of the patentee, therefore, amounts to this,—he informs the manufacturers of gasholders that by the use of an article well known in the iron trade much labour and expense may be spared. That clearly is not the subject of a patent. It is nothing more than the application of a well-known instrument to purposes analogous to those to which it had before been applied. It is unnecessary to observe upon any of the cases referred to. This is not a claim for a new article, or for an improved article, but only for a cheaper way of using known materials.

WILLES, J.—I am of the same opinion. No doubt, a new combination of old machinery or instruments whereby a new and useful result is attained, may be the subject of a patent. But there must be some *invention*. There is none here. By making a thing in one piece instead of, as before, uniting several pieces together, the patentee no doubt effects a considerable saving of labour and expense. The merit is due to the person who first produced the article called double angle-iron. That is old and well known, and had long been applied to purposes not dissimilar to that to which the present plaintiff applies it. The mere fact of its application to gasholders rendering their construction better or cheaper, does not constitute a subject-matter for a patent.

BYLES, J.—I am of the same opinion. The alleged invention is nothing more than the application of a known article to a purpose analogous to those to which it had long been applied. It is extremely \*452] difficult to distinguish this case and *Harwood v. The Great Northern Railway Company* from some of those which have been referred to by Mr. *Webster*. Suppose a common bucket, or the vessels used in a brewery plant, had formerly been made of three pieces of metal,—two for the sides, and one for the bottom,—and some

One discovered that an iron bucket or vat could be made cheaper of one piece; could a patent be taken out for that idea?

KEATING, J.—I am of the same opinion. This is nothing more than the application of an old and well-known thing to produce a result already well known, it may be in a better and cheaper manner. But there is no invention. *Harwood v. The Great Northern Railway Company* is a much stronger case than this, and certainly is an authority to show that this patent cannot be sustained.

Rule discharged.

### STRUGNELL v. FRIEDRICHSEN and Another. *May 27.*

A ship was chartered on the 12th of September, 1861, for the conveyance of a cargo of wheat from Harwich to St. Malo; ten days to be allowed for loading. The usual course was to load a portion of the cargo at a quay in the river Orwell, and to proceed lower down the river to take in the residue. The vessel having arrived on the 14th of September, and taken in 900 quarters (which was about three-fourths of the whole cargo), was proceeding down the river in charge of a pilot, when she got aground. The master, finding it necessary to take out the cargo in order to examine and repair the ship, gave notice to the charterers' agent, who accordingly, at the request of the master, and at the expense of the charterers, unloaded the 900 quarters, and despatched the whole quantity to its destination by other vessels. On the 4th of October, the master gave notice that he was ready to receive the cargo, and demanded it. The agent had none to ship:—Held, that the owner could not, under the circumstances, maintain an action against the charterers for not supplying a cargo.

THIS was an action by a shipowner against the charterers for refusing to load a cargo pursuant to the terms of the charter-party.

The charter-party, which bore date the 12th of September, 1861, stipulated that the ship *Arbutus* should forthwith proceed to Harwich, and there load a \*cargo of wheat, and proceed therewith to St. [\*453 Malo. Ten days were allowed for loading.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term, when it appeared that the *Arbutus* arrived at a place called Mistley, in the river Orwell, on the 14th of September, and there took on board 900 quarters of wheat, and on the 18th left the quay there under the charge of a pilot, and proceeded down the river (as was the usual course) to take in the rest of her cargo, 300 quarters; that, on her passage down the river, she got aground and received so much damage that the captain thought it necessary that the 900 quarters should be taken out, and the vessel examined and repaired; that he accordingly called upon the defendants' agent to unload the wheat, which was done on the 28th of September, at the expense of the defendants, and, time being important, the wheat was forwarded to St. Malo by other vessels; and that, the ship having been repaired, the master, on the 4th of October, gave notice thereof to the defendants' agent, and required him to reship the wheat, which he was unable to do.

The learned Judge, without intimating any opinion, directed a verdict to be entered for the plaintiff for 150*l.*, the damages agreed on, reserving leave to the defendants to move to enter a verdict for them if the Court (who were to be at liberty to draw inferences as a jury) should be of opinion that under the circumstances the plaintiff was not entitled to recover.

*Manisty, Q. C.*, in Easter Term last, obtained a rule nisi accordingly. He referred to *The General Steam Navigation Company v. Slipper*, 11 C. B. N.S. 498 (E. C. L. R. vol. 103). There, by the terms of a charter-party, the plaintiff's ship (a steam-vessel) was to proceed to H., to be \*454] there ready to load by a given day, or so near thereto as she \*might safely get, and there load from the factors of the merchant such quantity of oxen, sheep, and [or] other lawful produce which the merchant might find it convenient to ship, not exceeding what she could reasonably stow and carry over and above her tackle, &c., and, being so loaded, was to proceed therewith to London, and deliver the same on being paid freight a lump sum of 450*l*. Two working days were allowed for loading and discharging, and three days on demurrage. Arrived at H., the vessel went alongside the jetty, and received on board a number of barrels of hams and 300 head of live-stock, for which the captain signed bills of lading. Being thus laden, the vessel was found to draw too much water to get over the bar, and the captain was consequently obliged to take out all the stock. He then proposed to the charterers' agent to stow on board so many of the cattle as would enable him to pass over the bar, and to remain outside and there take in the remainder at the charterers' expense and risk. The agent declined to accede to this, and refused to put any of the cattle again on board, unless the captain would take all. Being unable to come to terms, the captain proceeded on his voyage with only the hams on board. And it was held, that, under these circumstances, the owners were not entitled either to the stipulated freight or to damages for the refusal to ship the cargo; for that, although the captain was not obliged to go within the bar at all, yet, having chosen to do so, and having received the cargo on board, and signed bills of lading, he was bound to find his way to his destination.

*Watkin Williams* now showed cause.—If the defendants meant to rely upon any supposed exoneration from the performance of their contract, they should have pleaded and proved a dispensation. \*455] [BYLES, J.—\*The plaintiff never was ready and willing to take on board the whole cargo.] On the 4th of October the master was in a condition to receive a full cargo, and demanded it. The defendants would have had no ground of complaint if the vessel had not arrived at Mistley at all until that day. [BYLES, J.—She could not get back to the quay to take the cargo; and the master tendered no expenses. WILLES, J.—Instead of unloading the 900 quarters at his own expense, the master allowed the charterers to do so at their expense. Was not that a discharge of the contract?] If the defendants intended to rely on a supposed abandonment of the voyage, they should have gone to the jury.

*Manisty, Q. C.*, was not called upon.

ERLE, C. J.—I am of opinion that this rule must be made absolute. The action is brought against the charterers for not supplying a cargo pursuant to the charter-party. The vessel, having taken three-fourths of the wheat on board, while proceeding to another part of the river for the purpose of receiving on board the remainder, took the ground and sustained damage. The master thereupon required the charterers' agent to take out what was shipped. He did so, and loaded it on

**board other vessels.** Under these circumstances, it seems to me to be perfectly clear that the action cannot be maintained.

The rest of the Court concurring,

Rule absolute.

**\*COOPER and Another v. HUBBUCK. June 6. [\*456**

To a declaration for obstructing ancient lights, the defendant pleaded the custom of London to build on ancient foundations to any height; that the defendant was possessed of an ancient messuage adjoining the plaintiffs' premises, and towards which the windows in the declaration mentioned looked; and that, pursuant to the custom, he built thereon, and thereby unavoidably a little obscured the plaintiffs' windows.

To this plea the plaintiffs replied, that the access of light and air to the windows in question had been enjoyed as of right and without interruption by the respective occupiers of the plaintiffs' messuage for and during the full period of twenty years before the said obstruction, and for and during the full period of twenty years next before the commencement of a *suit* (or *action*) wherein the plaintiffs' claim in this action, and to the said access and use of light and air, was and is brought into question:—

Held,—Williams, J., dissenting,—that the twenty years' enjoyment of the access and use of light to a dwelling-house, &c., under the 3d and 4th sections of the Prescription Act, 2 & 3 W. 4, c. 71, is to be taken to be the period next before *some* action or suit wherein the claim shall have been brought in question, and, consequently, that the replication was good.

The custom to rebuild to any height upon ancient foundations in the city of London, is destroyed by the Prescription Act, s. 3.

**THIS** was an action against the defendant for obstructing the plaintiffs' ancient windows.

The declaration stated, that, during all the times thereafter mentioned, the plaintiffs were the occupiers of a certain messuage and warehouse, with the appurtenances, and during the times aforesaid there were divers windows in the said messuage and warehouse through which the light and air during the times aforesaid ought of right to have entered, and still of right ought to enter into the said messuage and warehouse, for the more beneficial and convenient use and occupation and enjoyment thereof; yet that the defendant, wrongfully, on divers days and times obstructed and hindered and prevented the light and air from entering through the said windows into the said messuage and warehouse as they of right ought to have done, to wit, by building and erecting and keeping and continuing a certain building and erection near to the said windows; by reason of which premises the said messuage and warehouse were and are rendered dark, close, and inconvenient, and less fit for use and occupation, and otherwise deteriorated; and the plaintiffs had been otherwise damnified: Claim, 500*l*.

Sixth plea,—that the said messuage and warehouse, and also the said building and erection of the defendant in the declaration mentioned, were and are in the *\*city of London*, and that, in the *city of London*, from time whereof the memory of man is not to the contrary, there hath been and still is an ancient and laudable custom there used and approved of, that, if any person or persons or body corporate has or have a messuage or house in the said city near or contiguous and adjoining to another ancient messuage or house, or to the ancient foundations of another ancient messuage or house in the said city, of another person or persons or body corporate, his or their

neighbour there, and the windows or lights of such messuage or house as first aforesaid are looking, fronting, or situate towards, upon, or over, or against, the said other ancient messuage or house or ancient foundations of another ancient messuage or house of such other person or persons or body corporate, his or their neighbours there, so being near, adjacent, contiguous, or adjoining, although such messuage or house as first aforesaid and the lights and windows thereof be or were ancient, yet such other person or persons or body corporate, his or their neighbour or neighbours, being the owner or owners of such other ancient messuage or house or ancient foundations so being near, adjacent, or adjoining, by and according to the custom of the said city in the same city for all the time aforesaid used and approved, well and lawfully may, might, and has used, at his or their will and pleasure, his or their said other messuage or house, so being near, adjacent, or adjoining, by building to exalt or erect, or of new, upon the said ancient foundations of such other messuage or house, so being near, adjacent, or adjoining, to build or erect a new messuage or house to such height as the said owner or owners shall please, against and opposite to the said lights or windows near or contiguous to such other messuage or house, and by means thereof to obscure and \*458] darken such windows or lights, unless there be or hath been some writing, instrument, or record of an agreement or restriction to the contrary thereof in that behalf: That, before and at the time of the grievances in the declaration alleged, the defendant was seised and possessed of an ancient messuage or house and the foundations of a certain ancient messuage and house in the city of London, near, adjacent, and contiguous and adjoining to the said messuage and warehouse and appurtenances of the plaintiffs, and towards which the said windows in the declaration mentioned looked and fronted; and, being so seised, and there being and having been no writing, instrument, or record of an agreement or restriction to the contrary thereof in that behalf, the defendant, before and at the time of the alleged grievances, according to the said custom, exalted and erected his said ancient messuage or house, and of new upon the said ancient foundations built and erected a new messuage and house, against and opposite to the said windows of the plaintiffs, and thereby a little and to a necessary and unavoidable extent obscured and darkened such windows, and committed the grievances complained of, which are the same as in the said declaration mentioned.

The plaintiffs joined issue on all the pleas, except as to the custom alleged in the sixth plea.

And, for a further replication to the sixth plea, they said, that the access and use of light and air to and from the said messuage and warehouse into and through the said windows, which access and use of light and air was so obstructed, hindered, prevented, and injured by the defendant's acts as aforesaid, had been and was actually enjoyed with the said messuage, buildings, and warehouse, as of right and without interruption, by the respective occupiers of the messuage and warehouse, for and during the full period of twenty years before the said obstruction, hindering, prevention, and injury, and for and during the full \*459] period of twenty years next before the commencement of a *suit* in Her Majesty's High Court of Chancery com-

menced by the now plaintiffs against the now defendant, and wherein the now plaintiffs were plaintiffs, and the now defendant was defendant, and which is still pending, and in which suit the plaintiffs' claim herein, and to the said access and use of light and air, was and is brought into question; and that the said access and use of light and air was not during the said twenty years, or any part thereof, enjoyed as aforesaid by or by reason of any consent or agreement expressly made or given for that purpose by deed or writing; and that they, the plaintiffs, at the said times when, &c., were the occupiers of the said message and warehouse, with the appurtenances.

And, for a further replication to the sixth plea, the plaintiffs said, that the access and use of light and air to and from the said message, buildings, and warehouse, into and through the said windows, which access and use of light and air was so obstructed, hindered, prevented, and injured by the defendant's acts as aforesaid, had been and was actually enjoyed with the said message, buildings, and warehouse, as of right and without interruption, by one John Williams, an occupier of, and other the respective occupiers of the said message, buildings, and warehouse, for and during the full period of twenty years before the said obstruction, hindering, prevention, and injury, and for and during the full period of twenty years next before the commencement of an action in Her Majesty's Court of Common Pleas at Westminster, commenced on the 30th of October, 1856, by and at the suit of the said John Williams against the now defendant, and wherein the said John Williams was plaintiff and the now defendant was defendant, and which action is still pending, and in which action the said claim to have \*the said entry, access, and use of light and air through the said windows into the said message and warehouse, for [\*460 the more beneficial use and occupation and enjoyment thereof, was and is brought into question; and that the said entry, access, and use of light and air was not during the said twenty years, or any part thereof, enjoyed as aforesaid by or by reason of any consent or agreement expressly made or given for that purpose by deed or writing.

To these two replications the defendant demurred,—the ground of demurrer stated in the margin being, "that the enjoyment of the easement for twenty years before the Chancery suit, or the action at law, mentioned in the replications respectively, confers no right, and has not the same effect as an enjoyment for twenty years before *this action*." Joinder.

*J. Brown* (with whom was *Lush*, Q. C.), in support of the demurrer.(a)—The question in this case turns upon the construction to be put upon the 3d and 4th sections of the Prescription Act, 2 & 3 W. 4, c. 71. The 3d section enacts, that "when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years

(a) The points marked for argument on the part of the defendant were as follows:—

"That an enjoyment of the easement for twenty years before any other action or suit than the present action, is immaterial, and confers no right to maintain this action; that it ought to be an enjoyment for twenty years before this action; and that, if otherwise, an enjoyment had thirty or forty years since might support the claim, though long since abandoned or discontinued, and that both the replications demurred to are therefor bad."

without interruption, the right thereto shall be deemed absolute and \*461] indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." And the 4th section enacts, that "each of the respective periods of years hereinbefore (ss. 1, 2, 3) mentioned, shall be deemed and taken to be the period *next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question*, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." The question is, whether the enjoyment which is to confer the right must be an enjoyment for twenty years next before the suit or action in which the claim is set up, or whether it is enough that the enjoyment has been had for twenty years next before *some other action or suit*. It must be assumed, since the cases of *The Salters' Company v. Jay*, 8 Q. B. 109 (E. C. L. R. vol. 43), 2 Gale & D. 414, and *Truscott v. The Master and Wardens of the Merchant Tailors' Company*, 11 Exch. 855,† that the custom of the city of London referred to in the plea no longer exists. Very early after the passing of the statute, viz. in *Wright v. Williams*, 1 M. & W. 77,† *Tyrwh. & G.* 375, it was contended that the right should be shown to have been claimed and enjoyed for the periods mentioned before the acts complained of in the declaration; but the Court of Exchequer there held that it was sufficient to allege that the user had existed for the prescribed period *before the commencement of the suit*. [ERLE, C. J.—That will not be disputed: but, can you see any good reason why there should be two actions?] In *Richards v. Fry*, 7 Ad. & E. 698 \*462] (E. C. L. R. vol. 34), 3 N. & P. 67, to trespass for chasing and detaining cattle, the defendant pleaded that he was possessed of a messuage, &c., and that he and all occupiers thereof for the time being, for thirty years *next before the time when, &c.*, had of right had, and been used, &c., to have, common of pasture in the locus in quo, that the cattle were depasturing, &c., to the disturbance of such right of common, and that the defendant distrained, &c. On special demurrer, for that the right was not claimed to have been used, &c., for thirty years *before the commencement of the suit*,—it was held, that, as a plea under the statute in question, the plea was bad for not claiming the right either so, or as used, &c., thirty years before the commencement of *some suit*. Lord Denman, in delivering the judgment of the Court, after referring to the 1st, 4th, and 5th sections of the statute, says: "Taking these sections together, it seems quite clear that the averment of enjoyment for thirty years next before the times when, &c., is not in conformity with the Act. The period mentioned in the Act is plainly thirty years next before some suit or action in which the claim shall be brought into question. Generally speaking, that would be next before the commencement of the suit in which the pleading takes place: at all events, it is not next before the times when, &c. But we were pressed with absurdities and inconveniences which, it is supposed, would arise from such construction of the Act; and, on the

other hand, difficulties of the same nature were pointed out, to which we should give occasion by holding the plea to be good. These absurdities and inconveniences were urged to the Court of Exchequer in the case of *Wright v. Williams*, in which the averment was, 'next before the commencement of this suit:' but that Court held the averment to be correct; and the decision is directly in point; for, we cannot think, as \*was suggested at the bar, that both modes of averment are correct, and either may be adopted at the option of the pleader. [\*463

The periods in the two averments are certainly quite different; and the evidence requisite to support them manifestly not the same. We shall not attempt to obviate the difficulties which have been suggested: but, adhering to the express words of the statute, and to the decision in *Wright v. Williams*, with which we fully agree, we hold that the only correct averment is, 'next before the commencement of this' (or, possibly, 'some other') 'suit.'" [WILLES, J.—The words "shall have been or shall be" obviously refer to another suit.] In *Flight v. Thomas*, 8 Clark & F. 231, 241, Lord Cottenham, C., says: "As I read these two sections,"—the 3d and 4th,—"the meaning is that there must be twenty years from the commencement of the right of enjoyment to the commencement of the suit:" and, in support of this view, he refers to *Jones v. Price*, 3 N. C. 52 (E. C. L. R. vol. 32), 3 Scott 376, *Richards v. Fry*, 7 Ad. & E. 698 (E. C. L. R. vol. 34), 3 N. & P. 67, *Wright v. Williams*, 1 M. & W. 77,† *Tyrwh. & G.* 375, and *Lawson v. Langley*, 4 Ad. & E. 890 (E. C. L. R. vol. 31). And Lord Brougham says: "I cannot get over the words of the Act, in the 4th section, with respect to the completion of the twenty years being next before the action brought,"—the action in which the right is pleaded. The argument on the other side must go the length of saying, that, if there had been a suit between the grandfathers of these parties, it would be competent to the plaintiffs to set up an enjoyment of the right for twenty years before that suit. This kind of plea is given by way of substitution for the old plea of prescription, which always alleged an enjoyment for twenty years down to the time when, &c., and thence continually down to the commencement of this action. [WILLIAMS, J.—In *Ward v. Robins*, 15 M. & W. 237,† my \*Brother Willes, to the surprise of many, induced the Court of Exchequer to [\*464 hold a plea to an action for obstructing the plaintiff's right to the flow of water to his mill, to be good, which alleged, that before and at the times when, &c., the defendant was the occupier of a certain close adjoining to the watercourse, and that he and all others the occupiers for the time being of the said close, for twenty years next before the commencement of this suit enjoyed, as of right and without interruption, the right of from time to time, as occasion required, removing a part of the weir, and placing and keeping it at a lower height than the rest, to such an extent and for such a time as was necessary for diverting enough of the water to irrigate the said close; that, at the times when, &c., irrigation was necessary for the close, wherefore the defendant removed the said part of the weir, and placed and kept it at such lower height, to such an extent and for such a time as, and no more or longer than, was necessary for diverting the water for the irrigation of the said close, &c., thus treating the statute as operating by way of acquisition of a new right.] Parke, B., delivering the judgment of the

Court, there says: "We come to the conclusion that the plea is not bad as an argumentative traverse, which is the ground of objection stated in the special demurrer, on account of the peculiar nature of the right given by Lord Tenterden's Act from twenty years' enjoyment by the occupier. Such enjoyment, in order to give a right under that statute, must be up to the time of *the commencement of the suit*, not up to the time of the Act complained of; and, consequently, an enjoyment for twenty years or more before that Act gives only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of *the suit*." Some light may \*465] be thrown upon the question by the language of the 7th section, which enacts that "the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

\*466] *Bovill*, Q. C. (with whom was *Dowdeswell*), contra.(a)—"The intention of the Act was, to convert prescription into actual right. All that the 4th section meant to do, was, to define the period on the expiration of which the right shall be deemed to have accrued: and this it has done in plain and unequivocal language. See the difficulty which would result in this case, if the argument urged on the part of the defendant could be sustained. The plaintiffs' right to the enjoyment of light having been obstructed, they file their bill, and, the obstruction continuing, the Vice-Chancellor directs an action to be brought. A delay of two years has been the result: and, if the

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the last replication but one to the sixth plea is good, inasmuch as, under the statute 2 & 3 W. 4, c. 71, s. 3, the uninterrupted enjoyment of the access and use of light for twenty years without interruption, as in that replication stated, overrides and extinguishes the supposed local usage or custom of London to build on an ancient foundation, alleged in the sixth plea:

"2. That the suit in equity mentioned in that replication, which is still pending, having been brought within a year after the interruption of the right in which it is brought in question, under the 4th section preserved the right conferred or secured by this statute, and prevented that interruption from defeating it:

"3. That the said replication shows a good title to the right under the Prescription Act, notwithstanding the local usage or custom to the contrary set forth in the sixth plea:

"4. That the last replication to the sixth plea is good, inasmuch as, under the Prescription Act above referred to, the uninterrupted enjoyment of the access and use of light for twenty years without interruption, as in that replication stated, overrides and extinguishes the supposed local usage or custom of London to build on an ancient foundation, alleged in the sixth plea:

"5. That the action mentioned in that replication, which is still pending, having been brought within a year after the interruption of the right in which the claim to it is brought into question, under the 4th section preserved the right, and prevented that interruption from defeating it:

"6. That the said replication also shows a good title to the right under the Prescription Act, notwithstanding the local usage or custom to the contrary set forth in the sixth plea:

"7. That the local usage or custom set forth in the sixth plea is unreasonable and bad; that the said sixth plea shows no right to interrupt the plaintiffs in the enjoyment of their right to light; and that the sixth plea is bad on this ground."

contention on the other side were to succeed, the plaintiffs' right would be altogether lost because they were unable to get a decree in the suit within twelve months. There is abundant authority to warrant the Court in declining to sanction so absurd an argument. It is the twenty years' enjoyment, and not the action, which gives the right. The 7th section rather assists the plaintiffs' construction.

*Brown*, in reply.—The period of enjoyment has no reference to the event of the suit. The argument on the part of the plaintiffs would be equally good if the \*action from which the period is supposed to reckon had gone no further than the issuing of a writ. [\*467

*Cur. adv. vult.*

WILLES, J., delivered the judgment of the majority of the Court,—Erle, C. J., and Byles, J., concurring with him:—

This case turns entirely upon the construction of the 4th section of the Prescription Act, 2 & 3 W. 4, c. 71, and the question is whether the words "some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question," means generally any such suit or action, or individually each suit or action in which the question may from time to time arise. I adopt the former construction, as giving the words their ordinary meaning, without introducing any inconsistency or absurdity in the working of the Act; and I reject the latter, as unnecessarily attributing to the words a meaning other than their ordinary one.

The section in question is the last of those which deal with the creation of the right. It is not a section relating to pleading or procedure only, but has for its object to appoint the terminus of the period of prescription which by the previous sections was to confer a right. This it does by reference to the commencement of "some suit or action wherein the claim or matter, &c., shall have been or shall be brought in question." The effect, therefore, is, that, immediately upon the bringing of such suit or action, the enjoyment, if within the previous sections as to length and otherwise, shall ripen into a right. That becomes necessary immediately upon the bringing of the first "suit or action wherein the claim or matter, &c., shall have been or shall be brought in question." If the statute did not then come into operation, there \*would be a right without a remedy. If it does, as I think it will be admitted it [\*468 does, then come into operation, what is its effect? I answer, the creation of a right; not a mere excuse or temporary shift or contrivance for the purpose of that suit. This is an intelligible mode of operation, viz., the creation of a right upon the bringing of the first action in which, by reason of the claim having been "brought in question," it becomes necessary for the person claiming such right to possess it for the purpose of his action or defence: with this, that, by reason of such enjoyment before any suit being enough to establish a right, therefore, upon the bringing of any such subsequent suit or action, the claimant may rely upon an enjoyment satisfying the statute, ending with either the existing suit or any of the previous suits or actions.

Is, then, the right so acquired, and which may be asserted and established in the first action as fully as any right created by a formal grant, exhausted by the proceedings in the first action? I answer, no; because it is given as a right inherent in the land, as if it arose by grant, not as some machinery applicable to the one suit or action, and which cannot go beyond the period of the existence of such suit or action.

It was argued, indeed, that there might be a suit or action answering the description in the statute, and which might never go to trial, and that it would be strange that enjoyment preceding such a suit or action should have the effect of creating a right. It must be remembered, however, that, in order to have the claim "brought in question," there must be at least enough in the proceedings to apprise the parties that the claim was advanced, so that there might be an opportunity of litigating it; and the abandonment by the servient owner of the suit or defence, upon the ascertainment of the nature of the claim, would be practically equivalent to an establishment of it; whilst \*such

\*469] abandonment by the dominant owner would ordinarily bespeak a state of things in which the resumption of the claim in respect of enjoyment before such suit or action is improbable. But, what shall be said of the case in which the right is regularly established in the first action? In the case of a plea of prescription before the Act, the right would be thereby established between the parties and those claiming under them. Why not by this Act, for helping prescriptive claimants? Can it reasonably be contended that the right established in the first action evanesces upon the termination of the proceeding in which it is established, and that, in every subsequent action, the contest may be renewed? There is no estoppel, no plea of *res judicata* as to the right upon a plea or subsequent pleading under Lord Tenterden's Act, unless enjoyment before a former suit or action may be pleaded, as in the present case. And here, what an anomaly would result! In all cases in which the right might have been alleged generally before the Act, it may by the 5th section now be so alleged; and a finding upon a traverse of the right would be conclusive in a subsequent action. So that, if the dominant owner brings an action alleging in his declaration his right generally, and a disturbance of it, and upon a traverse of the right the plaintiff makes out his case under the Act, and has a verdict, that verdict is conclusive in a subsequent action. But, if the owner of the servient tenement bring an action, and the dominant owner, under the same section, plead an enjoyment for the period mentioned in the statute, ending with the commencement of the action, and that is traversed, and found for him, according to the defendant's argument it only decides the particular suit, and is of no avail except perhaps as merely evidence in a subsequent action, which seems a strange and inconsistent result.

\*470] Moreover, in cases where, pending a lawsuit, the \*enjoyment is suspended or so contested as to lose the character of an enjoyment as of right, the claimant, according to the construction which I reject, would lose all benefit of the statute, if his suit or action should raise any question which rendered an appeal necessary, so as to prolong the litigation for a year. This result seems to call for an astute construction, if necessary, to exclude it, rather than for an astute construction to bring it about.

Again, the section speaks of "suit or action." Now, it is not uncommon for such a litigation to commence with a Chancery suit, in the course of which the plaintiff is directed or permitted to bring an action. Is the right in the suit to depend upon one period of enjoyment, and in the action upon another, which may be incomplete because of the length of the proceedings in the suit, and the violence of the defendant, which rendered both suit and action necessary? I can-

not think so. I think the intention was, to give enjoyment under the Act the same effect as the evidence which would sustain a prescriptive claim before the Act, except that the terminus of the statutory enjoyment must be a suit or action which discloses the nature of the claim, and gives an opportunity of litigating it. I need hardly refer to authorities (see *Ward v. Ward*, 7 Exch. 838†), to show that the evidence to sustain a prescriptive claim before the Act need not have come down to the commencement of the suit, nor to any defined period. This, which might seem at first sight likely to produce hardship, is practically compensated for by the shortness of the period during which living evidence lasts, the difficulty which length of time during which enjoyment has been interrupted throws in the way of proving the existence of a right, or the presumption which it raises of its extinguishment, and the good sense of juries in requiring stringent evidence of stale claims. \*I do not pretend to say that in no case can inconvenience arise from the construction thus put upon the Act. [\*471 Of what law, however well considered, could this be averred? But I do say that no such case has been suggested, either likely to be of frequent occurrence, or so fraught with anomaly and practical mischief as those to which I have referred.

Further, I think it is not a sufficient explanation of the words "shall have been or shall be brought into question," to suggest that it may have been intended thereby to apply the statute to pending actions, and that the words "shall have been" exhaust themselves upon the period before the passing of the Act. The words seem to me more properly to apply to a future period,—the period of the suit in which it becomes necessary to assert the right.

Furthermore, are the rights, amongst others, that to light, which the statute says "shall be deemed absolute and indefeasible," unless it shall appear that they were enjoyed by consent given by deed or writing, to be made by construction subject to the further condition that they shall only last during the particular action in which they come in question, whatever its result, shall only relate to and excuse acts done during the statutory period before such action, and shall be defeated for all future purposes when the action comes to an end, that is, shall not be absolute, and shall not be indefeasible?

Hitherto I have considered this case as if the point involved were a new one, and untouched by authority. This, however, is not its true character: because, although the question has never been decided, it is one which has been known to lawyers since a short time after the passing of the Act (at least as early as the year 1837), and upon which the inclinations of opinion which have been indicated are not daverse to this judgment. In *Wright v. Williams*, 1 M. & W. 77,† \*1 Tyrwh. & G. 375, where it was decided that a plea averring an enjoyment for twenty years before the suit was sufficient, this question was incidentally noticed, and, as I read the judgment of the Court, an opinion expressed in favour of the view which I take. It is true, that, in the early part of the judgment, in stating the course of the argument, not the opinion of the Court, it is suggested by the Court as an objection which might have been made to the validity of the plea, "that an action could not perfect the title to the right, as the Act requires an enjoyment for the full period immediately before any action," as if the word "some" must be read "any,"

in a restricted sense. In the subsequent part of the judgment, however, the Court expressly recognise and proceed upon the notion of the creation of a right, without any suggestion that such right is to be a springing or intermittent one, expiring and reviving with each successive action. "It appears to us" (runs the judgment) "that the statute in question intended to confer, after the periods of enjoyment therein mentioned, a right from the first commencement, and to legalize every act done in the exercise of the right during their continuance," which latter was the point in the case. And, in the subsequent much-considered case of *Richards v. Fry*, 7 Ad. & E. 698, 707 (E. C. L. R. vol. 34), 3 N. & P. 67, the Court said: "We shall not attempt to obviate the difficulties which have been suggested; but, adhering to the express words of the statute, and to the decision in *Wright v. Williams*, with which we fully agree, we hold that the only correct averment is 'next before the commencement of this (or possibly some other) suit.'" This suggestion was acted upon by the pleader who drew the pleadings under consideration.

In my judgment, therefore,—which, in consequence of the difference of opinion in the Court, I advance with sincere deference, and \*473] after long consideration,—the words "*some suit or action wherein the claim or matter shall have been or shall be brought into question,*" do not mean only "*the action in which the claim shall be brought into question;*" and the judgment of the Court ought to be for the plaintiffs.

WILLIAMS, J.—In this case, which was an action for the obstruction of light, the question raised by the pleadings, is, whether the twenty years' uninterrupted enjoyment which is to confer the right under the 3d section of the Prescription Act, 2 & 3 W. 4, c. 71, must be for the period of twenty years next before the present suit or action, or whether it may be the period of twenty years next before another suit or action brought at some former period, wherein the claim to the right was brought into question.

I am of opinion that the period must be the twenty years next before the present action, and that therefore the replications are bad, and the defendant is entitled to our judgment.

The question turns entirely on the construction of the 4th section of the statute, which enacts that "each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question."

I think by these words the statute means, that, in any suit or action already commenced, or which shall hereafter be commenced, wherein the claim of the right conferred by the Act shall come into question, the periods are to be the periods next before such suit or action.

This is the construction put on this enactment in the considered judgment of the Court of Exchequer in *Wright v. Williams*, 1 M. & \*474] W. 77† (which was delivered \*by Lord Abinger, but is well known to have been written by Parke, B.), after an argument in which this section of the statute had been very fully and ably discussed by counsel. In that case the point decided was (and it has ever since been held to be the law), that the statutory periods must be

reckoned up to the commencement of the suit, and not up to the act complained of. But, in delivering judgment, the Court adverted to the inconveniences to which, as it had been urged during the argument, such a construction must lead, and particularly that no good title can arise under the statute, unless some action shall be brought by or against the party claiming it: and then the judgment proceeds (at p. 98) thus,—“to which it may be added, that *one* action could not perfect the title to the right, as the act requires an enjoyment for the full period immediately before *any* action.” In the case of *Richards v. Fry*, 7 Ad. & E. 698, 707 (E. C. L. R. vol. 34), 8 N. & P. 67, this point is left open; for, Lord Denman, in delivering the judgment of the Court, says, with respect to the proper form of a plea relying on the prescribed period,—“We hold that the only correct averment is, next before the commencement of this (or *possibly* some other) suit.”

But, after much consideration, I am of opinion that the passage which I have cited from the judgment in *Wright v. Williams* is good law: and, if so, it is obvious that it decides the present point.

The argument on the other side is, that the statute may well be understood to mean to confer an absolute and perfect right, if there has been an enjoyment of it for the requisite period before and up to the time of the commencement of any action in which the claim is brought into question; for, then, a right under the statute may be pleaded. It therefore must exist; and, if so, it may be pleaded in any subsequent action. \*If the right has ripened into maturity, it is urged, for the purpose of a former action, it continues for [\*475 the purpose of a later one, though the party may also, if he pleases, in the later one rely on the enjoyment up to its commencement.

On considering this argument, and every branch of this subject, it is requisite to bear in mind that the question is whether a title *given by the Act* can be set up in the present action. It was established by the case of *Ward v. Robins*, 15 M. & W. 237,† not only that a title *under the Act* cannot arise unless some action is brought, but also, that, however long and continual the enjoyment of the right may have been up to the time of the grievance complained of, the title gained thereby under the Act is only inchoate, and is not completed but by enjoyment continued up to the commencement of the suit. The title is then complete *for the purposes of that suit*. But the question is whether it is perfect for the purposes of a subsequent suit: and I think the judgment in *Wright v. Williams* is right in laying down that it is not, unless there has been a continued enjoyment up to the commencement of the subsequent suit.

I am led to this conclusion, not only by the authority of that judgment, but also by considering what would be the consequence of adopting the contrary construction of the section.

It is obvious that a plea would be good which averred the enjoyment for the required period up to the former suit, although it did not aver how long an interval elapsed between that suit and the present, and whether or how the former had terminated. Hence, such a plea in an action like the present might be supported in evidence by proof of twenty years' enjoyment up to the bringing of a former action, notwithstanding the former action was brought respecting the

\*476] \*same obstruction several years ago, and, after proceeding so far as to bring the claim into question, had been dropped, and the obstruction had continued unabated from the time it was erected all through the interval between the two actions. This surely would be at variance with the general policy of the Act, which appears to found the rights it confers so essentially on the uninterrupted and continued enjoyment of them.

Again, there is nothing unintelligible in the legislature having enacted, that, in every suit, a title under the Act may be relied on, if the enjoyment has lasted for the requisite period up to the commencement of the suit. But it is not easy to understand why the bringing of a former suit should be made the terminus ad quem, without regard to any question how that suit was decided, or whether it has come to a determination or not.

Moreover, it seems a strange thing to make the commencement of an action the point of time for the birth of the right, when it cannot be ascertained whether the right will come into existence or not till the parties have pleaded and made it appear that the claim is brought into question.

It is remarkable that no plea or replication of this nature has ever, as far as I am aware, been pleaded before. Since the case of *Richards v. Fry*, 7 Ad. & E. 698 (E. C. L. R. vol. 34), 3 N. & P. 67, pleadings which have claimed rights conferred by the Act, have, I believe, uniformly alleged enjoyment up to the time of the commencement of the present suit.

The judgment of the Court, however, in conformity with the opinions of the majority of the Court, will be for the plaintiffs.

Judgment for the plaintiffs.

\*477] \*BETTELEY v. STAINSBY. *June 14.*

A declaration on a contract assigned for breaches,—first, that the defendant failed to replace certain amounts of preferential stock in a railway company,—secondly, that he failed to pay the plaintiff the dividends which became due upon such stock,—thirdly, that he failed to indemnify the plaintiff against calls made on certain mining shares assigned by him to the plaintiff as a security for the replacement of the stock above mentioned, which calls had been made and paid by the plaintiff. The defendant pleaded his bankruptcy, and that the causes of action accrued before that event:—Held, that the plaintiff's claim in respect of the failure to replace the stock was a debt or demand provable under the 166th section of the 12 & 13 Vict. c. 106; but not as a liability to pay a debt or sum of money on a contingency, within the 177th or 178th sections.

THIS was an action for not replacing certain railway stock, &c., pursuant to a contract for that purpose.

The declaration stated, that, by a deed made and dated the 14th of December, 1854, between the defendant of the one part, and the plaintiff of the other part, and executed by the plaintiff and the defendant,—after reciting that the plaintiff had been on or about the 10th of January, 1854, the holder of and entitled to 6000*l.* preference stock of and in the Oxford, Worcester, and Wolverhampton Railway Company, and that the defendant had then applied to and requested the plaintiff to sell the said 6000*l.* preference stock, and to lend and advance to

him the defendant such moneys as the same might realize when so sold, which the plaintiff had then promised and agreed to do upon the defendant then promising and agreeing to and with the plaintiff to repay him such moneys as might be so realized as aforesaid, and as should be so lent and advanced to the defendant as aforesaid, with interest thereon at and after the rate of 5*l*. per cent. per annum, on the 24th of June, 1854; and that the plaintiff had then or shortly thereafter sold the said 6000*l*. preference stock aforesaid as so requested as aforesaid, and had received as the price of the same and as the proceeds thereof the sum of 6004*l*. 19*s*., and had then, at the request of the defendant as aforesaid, lent and advanced to him the said sum of 6004*l*. 19*s*., whereupon the defendant then and in consideration of all the premises aforesaid promised the plaintiff to repay to him the said sum of 6004*l*. 19*s*. on \*the said 24th of June, 1854, with interest thereon at and after the rate of 5*l*. per cent. per annum as [\*478 aforesaid, and had then, for the better securing to the plaintiff the due repayment of the said sum of 6004*l*. 19*s*., and the payment of the said interest, transferred to and into the name of the plaintiff 2000 shares of and in the Wheal Guskin Company, and 2000 shares of and in the Drakewall's Mines Company, and had transferred to and deposited with the plaintiff 4650 shares of and in the British Colonial Smelting and Reduction Company, which said Guskin and Drakewall's Mines Shares at the time of the date of the said deed still remained in the name of the plaintiff, and which said British Colonial Smelting and Reduction Company's shares then still were deposited with and stood in the name of the plaintiff; and also reciting that the said 24th of June, 1854, was long since passed, and the defendant had not repaid to the plaintiff the said sum of 6004*l*. 19*s*. so lent as aforesaid, though often requested by the plaintiff so to do; and that the defendant had requested the plaintiff to give further time to him the defendant for the repayment of the said sum of 6004*l*. 19*s*., and to forbear from commencing or prosecuting any suit or action at law or in equity against him the defendant in respect of the said sum of 6004*l*. 19*s*., or for the recovery thereof, which the plaintiff had consented and agreed to do for a certain time, that is to say, until the 16th of May, 1855, upon the covenants, terms, and conditions thereafter contained,—He the defendant did thereby covenant, promise, and agree with and to the plaintiff that he the defendant should and would on or before the 16th of May, 1855, purchase 2000*l*. preference stock of and in the said Oxford, Worcester, and Wolverhampton Railway Company, in the name of the plaintiff, and the same should and would then \*duly transfer and cause to be transferred to and into the name of the plaintiff, and then and thereupon deliver to the plaintiff [\*479 the transfer and transfers of and for the whole of such 2000*l*. stock, and the certificates or coupons of and for the same: And the defendant did then further covenant with the plaintiff, that he the defendant should and would on or before the 16th of September, 1855, purchase other and further 2000*l*. like preference stock of and in the said Oxford, Worcester, and Wolverhampton Railway Company, in the name of the plaintiff, and the same duly transfer or cause to be transferred to and into the name of the plaintiff, and then and thereupon deliver to the plaintiff the transfer or transfers of or for the whole of the said

last-mentioned 2000*l.* stock, and the certificate or coupons of and for the same: And the defendant did thereby further covenant with the plaintiff that he the defendant should and would on or before the 16th of January, 1856, purchase other and further 2000*l.* like preference stock in the said railway Company in the name of the plaintiff, and the same should and would then duly transfer or cause to be transferred to and into the name of the plaintiff, and then and thereupon deliver to the plaintiff the transfer or transfers of and for the whole of such last-mentioned 2000*l.* stock, and the certificates or coupons for the same: And the defendant did thereby further covenant with the plaintiff that he the defendant should and would from time to time pay to the plaintiff, by way of interest on the said sum of 6004*l.* 19*s.* so lent and remaining due as aforesaid, such sums or sum of money as might at any time or times after the date thereof and from time to time be declared or made payable by the said Oxford, Worcester, and Wolverhampton Railway Company as interest, dividends, bonuses, or \*480] otherwise, upon the preference stock of and \*in the said Company for or in respect of 6000*l.* thereof, such payments to be made by the defendant to the plaintiff from time to time, and always upon the first day or days upon which such interest, dividends, bonuses, or other moneys might from time to time be and become payable by the said Oxford, Worcester, and Wolverhampton Railway Company to the holders of the said preference stock therein: Provided always, that, if the defendant should duly purchase in the name of the plaintiff, and should also duly transfer or cause to be transferred to and into the name of the plaintiff, the said three several amounts of 2000*l.* stock aforesaid upon the days and at the times when the same were to be so purchased and transferred as aforesaid, and should then also duly deliver to the plaintiff the certificates or coupons of and for the same respectively, then and in such case the said payments so to be made to the plaintiff by way of interest, and becoming due and payable after the said several days, should be proportionably reduced and diminished: And the defendant did thereby covenant further with the plaintiff that he the defendant should and would at all times, and from time to time, hold and keep the plaintiff harmless and indemnified from and against all calls that might at any time or times be made upon or in respect of the said shares in the said Wheal Guskyn Company, and from and against all and all manner of charges, liabilities, or costs then existing or attaching to or upon the said shares, or any or either of them, or in any way in respect thereof, or that might at any time thereafter accrue, exist, or attach to or upon the said shares, or any or either of them, or in any way in respect thereof, and should and would from time to time and at all times discharge and defray the same and all and every of them out of his own proper moneys: And the defendant thereby further covenanted with the plaintiff, that, if default \*should be at any time or times made by \*481] the defendant in the due purchase and transfer to the plaintiff of the said three several amounts of 2000*l.* stock, or of any or either of them, upon the days and at the times in that behalf severally thereinbefore provided, or in the delivery to the plaintiff of the said certificates or coupons, or of any or either of them, or in the due payment to the plaintiff of the said sum or sums so provided to be

paid to him by way of interest as aforesaid at the times and from time to time and in the manner in that behalf therein provided; or if the said defendant should at any time or times fail or neglect to pay, discharge, and defray all and all manner of calls, charges, liabilities, or costs upon, relating to, or attaching to, or in any way in respect of, the said several shares thereinbefore described; or at any time or times fail or neglect to hold and keep the plaintiff harmless and indemnified from and against all and all manner of such calls, charges, liabilities, or costs,—and notwithstanding any previous or other breach of the above covenants, terms, or conditions, or of any or either of them, and notwithstanding any waiver by the plaintiff of the due performance thereof,—the said defendant should and would forthwith and thereupon purchase in the name of the plaintiff, and should and would then duly transfer or cause to be transferred to and into the name of the plaintiff 6000*l.* of the said preference stock, or so much thereof as might not have been by the defendant already purchased or transferred for, to, and into the name of the plaintiff; and should and would then also deliver to the plaintiff the certificates or coupons of the stock so transferred or to be transferred: Yet the plaintiff in fact said, that, although the plaintiff had done all things necessary, and all things had occurred and happened necessary, and all conditions precedent had happened and performed necessary, and all times had elapsed and passed necessary to entitle the plaintiff to have the defendant do and perform the several acts, matters, and things which he was thereafter alleged not to have done, and to entitle the plaintiff to maintain this action for the breaches of covenant respectively thereafter complained of,—that the defendant broke his said covenant in this, that he did not nor would, on or before the said 16th of May, 1855, or at any time whatsoever, purchase the said 2000*l.* preference stock of and in the said Oxford, Worcester, and Wolverhampton Railway Company, in the name of the plaintiff, nor did he then or at any time duly transfer or cause to be transferred to or into the name of the plaintiff such stock as last aforesaid, or then or thereupon deliver to the plaintiff the transfer or transfers of or for the whole of such 2000*l.* stock, or any part thereof: And the defendant also broke his said covenant in this, that he did not nor would, on or before the said 16th of September, 1855, or at any time whatsoever, purchase other or further 2000*l.* like preference stock of or in the said Oxford, Worcester, and Wolverhampton Railway Company, in the name of the plaintiff, nor did he then or at any other time duly transfer or cause to be transferred to or into the name of the plaintiff such stock as last aforesaid, or then or thereupon deliver to the said plaintiff the transfer or transfers of and for the whole of the said last-mentioned 2000*l.* stock, or the certificates or coupons of or for the same, or any part thereof: And the defendant further broke his said covenant in this, that he did not nor would, on or before the said 16th of January, 1856, or at any other time, purchase other or further 2000*l.* like preference stock in the said Oxford, Worcester, and Wolverhampton Railway Company, in the name of the plaintiff, nor did he then or at any other time duly transfer or cause to be transferred to or into the name of the plaintiff such stock as last aforesaid, or then or

\*483] \*thereupon deliver to the plaintiff the transfer or transfers of or for the whole of such last-mentioned 2000*l.* stock, or any part thereof, or the certificates or coupons for the same, or any or either of them: And the defendant further broke his said covenant in this, that, although, at divers times after the date of the said deed, and before the commencement of this suit, divers large sums of money from time to time were declared and made payable and were then paid by the said Oxford, Worcester, and Wolverhampton Railway Company, as interest, dividends, bonuses, and otherwise, upon the said preference stock of and in the said Company, for and in respect of 6000*l.* thereof, and although the defendant did never duly or otherwise purchase in the name of the plaintiff, or duly transfer or cause to be transferred into his name, the said several amounts of 2000*l.* stock aforesaid, or any of them, or any part thereof, on the days or times thereinbefore above mentioned, or at any time whatsoever, and although the said sum of 6004*l.* 19*s.* still remained due and owing to the plaintiff as aforesaid, yet the defendant did not nor would he from time to time, or at any time, pay to the plaintiff, by way of interest on the said sum of 6004*l.* 19*s.* so lent and remaining due as aforesaid, any such sum or sums of money as were at such time and times as aforesaid declared and made payable and paid by the said Oxford, Worcester, and Wolverhampton Railway Company upon the said preference stock, or in respect of 6000*l.* thereof, upon the days or times last aforesaid, or at any time whatsoever, but refused and omitted so to do: And the defendant further broke his said covenant in this, that, although, after the making of the said deed, and before the commencement of this suit, divers calls, amounting in the whole to a great sum of money, were duly made upon and in respect of the said shares in the said Wheal \*Guskin Company, and although, at the time

\*484] of the making of the said deed, divers large charges, liabilities, and costs existed and attached, and at divers times thereafter and before the commencement of this suit accrued, existed, and attached to, upon, and in respect of the shares, yet the plaintiff was forced and obliged to and did pay and discharge such calls, charges, liabilities, and costs: And the defendant did not nor would hold or keep the plaintiff harmless or indemnified from or against the said last-mentioned calls, charges, liabilities, or costs, or any or either of them, nor did nor would the defendant discharge or defray the same, or any part thereof, out of his own proper moneys or otherwise howsoever, but refused and omitted so to do; and the plaintiff by means of the premises had been and was damaged, to wit, to the amount of the said calls, charges, liabilities, and costs: And the defendant further broke his said covenant in this, that although, before the commencement of this suit, the defendant committed such breaches of covenant as aforesaid, and made default in the due purchase and transfer to the plaintiff of the said three several amounts of 2000*l.* stock, and each and every of them, upon the days or at the times in that behalf severally provided, or at any time whatsoever, and in the due payment to the plaintiff of the said several sums so provided to be paid to him by way of interest as aforesaid at the times and in the manner in that behalf provided as aforesaid, and in paying, discharging, and defraying each and every of the said calls, charges, liabilities, and costs upon

and relating to and attaching to and in respect of the said several shares, and in holding and keeping the plaintiff harmless and indemnified from and against such calls, charges, liabilities, and costs as aforesaid, yet the defendant did not nor would forthwith, or thereupon, or at any time, \*purchase in the name of the plaintiff, or duly transfer or cause to be transferred to or into the name of the [485 plaintiff the said 6000*l.* of the said preference stock, or any part thereof, nor did he nor would he deliver to the plaintiff the certificates or coupons of the said last-mentioned stock, but wholly refused and omitted so to do, and the said last-mentioned stock and every part thereof remained wholly untransferred to or into the name of the plaintiff: Claim, 10,000*l.*

Fifth plea,—as to the said alleged breaches of covenant firstly, secondly, and thirdly, above assigned,—that, after the passing and commencement of The Bankrupt Law Consolidation Act, 1849, and before the passing of “The Bankruptcy Act, 1861,” the defendant became bankrupt within the true intent and meaning of the statutes then in force concerning bankrupts, and that the said alleged causes of action as to which that plea was pleaded accrued before the defendant so became bankrupt.

The sixth was a similar plea to the fourth breach; the seventh a similar plea to the fifth breach; and the eighth a similar plea to the sixth breach.

The plaintiff demurred to the fifth, seventh, and eighth pleas, the grounds of demurrer stated in the margin being, “that the pleas are no answer to the breaches respectively to which they are pleaded, as such breaches respectively involve questions of unadjudicated claims, and do not disclose claims for debts.” Joinder.

*Hannen*, in support of the demurrer.(a)—The claim \*of the [486 plaintiff is not for a debt or demand provable under the 165th section(b) of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, but for unliquidated damages for the breach of a covenant to do an act: nor is it provable as a liability to pay a debt or sum of money on a contingency, within the 177th or 178th section.(c) 1. A

(a) The points marked for argument on the part of the plaintiff were as follows:—

“Upon the argument of the demurrer to the defendant’s fifth, seventh, and eighth pleas, the plaintiff will contend that the claims arising under the first, second, third, fifth, and sixth breaches of covenant are claims of an uncertain and unliquidated amount, and were not provable under the defendant’s bankruptcy; and that therefore the defendant’s bankruptcy did not operate as a discharge of those claims.”

(b) The 165th section enacts “that every person with whom any bankrupt shall have really and bona fide contracted any debt or demand before the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, shall notwithstanding any prior act of bankruptcy, committed by such bankrupt, be admitted to prove the same, as if no such act of bankruptcy had been committed, provided such person had not at the time the same was contracted notice of any act of bankruptcy by such bankrupt committed.”

(c) The 177th section enacts, “that, if any bankrupt shall, before the issuing of the fiat or the filing of a petition for adjudication of bankruptcy, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such fiat or the filing of such petition, the person with whom such debt has been contracted may, if he think fit, apply to the Court to set a value upon such debt, and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt and receive dividends with the other creditors, not disturbing any former dividends; r

\*487] leading case on the subject \*is *Green v. Bicknell*, 8 Ad. & E. 701 (E. C. L. R. vol. 35), 3 N. & P. 634. There, it was stated in a special case, that, by contract between B. and G., the latter agreed to sell to the former all the oil which should arrive by a certain ship, which B. was to receive within fourteen days after the landing of the cargo, and pay for, at the expiration of that time, by bills or money, at a specified price per tun, with customary allowances; that the ship arrived, and the cargo was landed, and G. tendered the oil to B. at the end of fourteen days; that the quantity of oil, after allowances, &c., was a certain number of tuns stated in the case; that, at the time of the tender, the market-price of oil was lower than the contract price by an amount stated; that B., on the tender being made, refused to accept; and that the difference of prices was within the knowledge of the parties: and the Court held, that, B. having become bankrupt after the refusal, G. could not prove for this breach of contract under the commission; for, that, although G.'s claim would be measured by the difference between the contract and market prices at the time when

\*488] B. should have fulfilled his contract, yet the case did not show that the data on which the calculation must proceed were so settled as to admit of no dispute, and render the intervention of a jury unnecessary; and, consequently, the claim of G. was not for a debt, but for damages. In giving judgment there, Lord Denman says: "In many cases in Chancery, proof has been admitted of the value of stock agreed to be transferred at a given day. Most of them are cases of loans of stock (see *Utterson v. Vernon*, 3 T. R. 539, *Parker v. Ramsbottom*, 3 B. & C. 257 (E. C. L. R. vol. 10), 5 D. & R. 138 (E. C. L. R. vol. 16)); but there is one instance of allowing the value of a sum of stock to be proved, which was covenanted to be transferred by a marriage-settlement (*Ex parte Campbell*, 16 Ves. 244). We were strongly pressed with these authorities, as establishing the principle that any right to recover money or money's worth may be treated as a debt, when its amount can be fixed by calculation. But we think that those cases must be regarded as exceptions to the rule, which is, generally speaking, that no claim of this nature shall be provable as a debt, for which the intervention of a jury is necessary." In the case of Government stock, there is but one contingency, viz. the fluctuation in the market value: but, with regard to railway and mining shares or stock, the contingencies affecting their value are infinitely various. It may be that the performance of the covenant in that respect would be a burthen to the covenantee. In *Owen v. Routh*,

such person had not when such debt was contracted notice of any act of bankruptcy by such bankrupt committed."

And the 178th section enacts, "that, if any trader who shall become bankrupt after the commencement of this Act shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this Act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the Court shall think fit; and, after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends; provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed."

14 C. B. 327 (E. C. L. R. vol. 78), this Court held that the discharge of an insolvent under the 1 & 2 Vict. c. 110, did not operate to release him from a claim for unliquidated damages for not redelivering mining shares, pursuant to a contract for that purpose. With reference to the case of *Utterson v. Vernon*, Maule, J., there observes,—“Stock is treated as a pecuniary thing. In strictness, it is a right to receive an annuity.” That is a \*distinct authority to show that stock or shares in a trading body do not fall within the [\*489 decisions as to Government stock. The claim for not indemnifying the plaintiff against calls is of a more uncertain character still. In *Taylor v. Young*, 3 B. & Ald. 521 (E. C. L. R. vol. 5), one of two assignees of a lease gave a bond to the lessee, by whom the assignment was made, conditioned for the payment of the rent to the lessor, and the performance of the other covenants in the lease, and for indemnifying the lessee against the non-performance of the covenants: both the assignees of the lease having become bankrupt, and the bond having been forfeited before the bankruptcy—it was held that the lessee could not prove, in respect of the penalty, under the commission, the bond being incapable of valuation. “The entire value of the bond,” says Abbott, C. J., “could not have been proved, because it is manifest that an indemnity is incapable of being estimated; and I am not aware of any case in which a partial proof under such a bond as this has been admitted.” Who can estimate the value of a covenant to indemnify against calls on mining shares?

2. Then, is this a “debt payable upon a contingency,” within s. 177, or “a liability to pay money upon a contingency,” within s. 178? It is obviously not a debt. The subject was very fully considered in *Warburg v. Tucker*, 5 Ellis & B. 384 (E. C. L. R. vol. 85). There, the defendant, being indebted to the plaintiff, assigned to him as security an insurance on the defendant’s life and an insurance on the life of the defendant’s wife, and covenanted,—first, to pay the premiums,—secondly, that, if he did not pay them, the plaintiff might pay them, and the defendant would repay the plaintiff. The plaintiff sued the defendant on this covenant, assigning as breaches of covenant,—first, that the defendant had not paid the premiums,—and, \*secondly, that the defendant had not paid to the plaintiff premiums paid by the plaintiff on the defendant’s default. The [\*490 defendant pleaded, to the whole declaration, his bankruptcy and certificate, averring that they had occurred after the execution of the deed, but not that they had occurred after the breaches had taken place. On demurrer, the Court of Queen’s Bench held that the plea gave no answer to the declaration, neither of the plaintiff’s claims being a debt payable upon a contingency within s. 177 of the 12 & 13 Vict. c. 106, nor a liability to pay money upon a contingency, within s. 178. All the elements of uncertainty pointed out by the Court there are equally present here. [WILLES, J., referred to *Maples*, app., *Pepper*, resp., 18 C. B. 177.]

*M. Smith*, Q. C., contra (a)—A demand arising out of the breach of

(a) The points marked for argument on the part of the defendant were as follows:—

As to the fifth and eighth pleas,—“That the causes of action to which the fifth and eighth pleas are pleaded relate to a loan of railway stock, and to the breaches of covenants in not replacing such stock at certain times which had elapsed before the bankruptcy, and therefore,

\*491] a covenant to replace Government stock \*has been repeatedly held, both in equity and in the common-law courts, to be provable in bankruptcy. [BYLES, J.—Government stock is always to be had, and at an ascertained price.] Here, so far as regards the first four breaches, the stock stands upon the same footing as Government, or India, or Bank stock: it is stock created by an Act of Parliament, and transferrable by a simple entry of transfer in the Company's books, and the value of which is ascertainable at any moment. [WILLES, J.—Ex parte Harrison, 3 Mont. D. & De Gex 350, and Ex parte Bateman, in re Routledge, 25 Law J., Bankruptcy 19, are very strong cases. In the former, A. agreed to sell to B. for 4000*l.* a ship employed on a distant voyage, when she should arrive at her port of discharge in the United Kingdom; and B. agreed, within one month after her arrival, or within such further time as should be necessary for effecting the repairs and discharging the cargo, on the execution of a bill of sale of the vessel, to deliver to A. two promissory notes for the amount of the purchase-money, in default of which A. might sell the ship and keep the proceeds in part of the purchase-money, B. undertaking to pay A. any deficiency within one calendar month after such sale; and in case the vessel should be lost, the agreement was to be void. On the 27th of March the ship arrived, before which time B. became bankrupt. On the 31st of March, A. gave notice of her arrival to the assignees, who declined to complete the contract, and A. sold the ship for 2838*l.* It was held by Vice-Chancellor Knight Bruce that this agreement amounted to a contract on the part of B. to pay a certain sum on a contingency, liable to be reduced on another contingency; and that A. might prove for the balance of the 4000*l.*, after deducting the amount of the proceeds of the sale of the ship. Ex \*492] parte Bateman, in re Routledge, is still stronger. \*There, the proprietors of saw-mills contracted to saw timber for a merchant, and to insure him against loss as to any timber that might be destroyed by fire. A fire took place, and the timber at that time at the mills was destroyed. The parties to the contract agreed as to the quantity and quality of the timber destroyed, and the merchant brought an action for the alleged value, and the saw-mill proprietors soon afterwards were adjudicated bankrupt. The merchant proceeded with the action, notwithstanding the adjudication, and recovered a verdict for the sum alleged to be the value, and tendered a proof for that sum before the Commissioner, who rejected it, but recommended an appeal. And it was held that the amount of the loss was capable of being ascertained, and that the merchant was entitled to prove. Here, the breach took place before the bankruptcy of the defendant.] In *Young v. Winter*, 16 C. B. 401 (E. C. L. R. vol. 81), A., being indebted to B., assigned to him a policy of assurance on his life, and

by analogy to the cases relating to government stock, the plaintiff was entitled to prove, and was allowed to prove under the defendant's bankruptcy for the dividends and the value of such stock at the date of the bankruptcy, and the defendant's certificate is a bar to the causes of action to which the fifth and eighth pleas are pleaded, and such pleas are good."

*As to the seventh plea*,—"That the damnification in respect of which the fifth breach is assigned having happened before the bankruptcy, and being then of an ascertained amount and value, the plaintiff was entitled to prove in respect thereof under the bankruptcy, and the defendant's certificate is a bar to the cause of action to which the seventh plea is pleaded, and such plea is good."

covenanted to pay the annual premiums, and in case he did not, and A. should pay them, he would repay him the amount, with interest, on demand. B. afterwards became bankrupt, and obtained his certificate. A premium accruing due after the bankruptcy, and being unpaid by B., and A. having paid it, and not been repaid,—this Court held that B. was not discharged, by virtue of the 12 & 13 Vict. c. 106, ss. 178, 200, from liability for the breach of the *first* of these covenants, but that he *was* discharged quoad the breach of the *second* covenant,—the amount so far being capable of being ascertained. [WILLES, J.—Is not that inconsistent with *Warburg v. Tucker*, 5 Ellis & B. 384 (E. C. L. R. vol. 85), and in error, E. B. & E. 914 (E. C. L. R. vol. 96)?] Undoubtedly it is so: but, in *Ex parte Barwis*, in re Strahan, 25 L. J., Bankruptcy 10, the Lords Justices seem to incline towards the decision in this Court; for \*Lord Justice Turner there says: “As to the cases of *Young v. Winter* and [\*493 *Warburg v. Tucker*, he should not say much about them. He did not see how they could be reconciled; and, if it were necessary to decide between them, he should prefer following *Young v. Winter*.” [BYLES, J.—In *Ex parte Bateman*, the amount was a mere matter of calculation.] To be ascertained by reference to the market price. [WILLES, J.—The principle seems to be well enunciated by Coltman, J., in delivering the judgment of the Court in *Woolley v. Smith*, 3 C. B. 610, 623 (E. C. L. R. vol. 54): “The cases relating to contracts to replace stock appear to rest on the same principle as *Johnson v. Spiller*, 1 Dougl. 167, viz. that, where the day for replacing it has passed before the bankruptcy, so much of the money produced by the original sale as would have been necessary to replace it on the day appointed may be considered as money had and received to the use of the party lending the stock, and it is therefore a debt ascertained at the time of the bankruptcy: on the other hand, where a contract has been broken, and the demand thereupon arising is not a debt, but damages, the amount of which may depend on various circumstances, and which it is necessary that a jury should estimate, unless they are ascertained before the issuing of a fiat, they cannot be proved.”] That principle may well apply here. [BYLES, J.—Can this Court see that there will always be sufficient stock of this Company to be had in the market, and at an ascertained price?] It will be assumed that the existing state of things continues. In *Ex parte Bateman*, Lord Justice Turner says: “In the present case I see nothing which can be open to dispute, except the mere question of value: and it is, I think, sufficiently proved that there is a market price governing the value of timber.” There were \*many more elements of uncertainty in that case than can possibly be suggested here. [WILLES, J. [\*494 —The result of the decisions seems to be, that, where the value only is in dispute, that is a sum payable upon a contingency, and provable. ERLE, C. J.—Where the article is one of which there is an indefinite supply always in the market.] *Owen v. Routh*, 14 C. B. 327 (E. C. L. R. vol. 78), turned upon the Insolvent Debtors Act, the words of which are much more limited than those of the Act under consideration. If this was not provable as a debt or demand within the 165th section, it is at all events “a liability to pay money upon a contingency” within s. 178. [BYLES, J.—The contingency there would be

that of a co-surety.] No doubt it embraces the case of sureties: the intention was, as is said by Jervis, C. J., in *Maples, app., Pepper, resp.* to take in every contingency. *Warburg v. Tucker* is clearly distinguishable. There was no liability at all at the time of the bankruptcy; no cause of action; the only contingency was whether any breaches would accrue or not. [BYLES, J.—The ground of the decision was, that the liability, if any, was a liability to pay damages, not a liability to pay money upon a contingency.] The judgment of Williams, J., in that case (in error), does not touch the authority of *Young v. Winter*. [WILLIAMS, J.—The Barons, however, set themselves on the side of the Queen's Bench. *Warburg v. Tucker* was afterwards considered in a case in this Court, of *Boyd v. Robins*, 4 C. B. N. S. 749 (E. C. L. R. vol. 93). There, A. and B., in July, 1850, gave C. a guarantee (continuing) for goods to be supplied to D., with a stipulation that the security should subsist "until C. received a notice in writing to the contrary:" goods were supplied to D. upon the faith of this guarantee, and a balance exceeding 200*l.* was due in \*495] respect thereof: in June, 1854, B. became \*bankrupt, and duly obtained his certificate: no notice having been given to determine the guarantee,—this Court held that B.'s liability therein was a "contingent liability" within s. 178. This decision was reversed by the Exchequer Chamber, 5 C. B. N. S. 597 (E. C. L. R. vol. 94); and the judgment of the Lord Chief Baron is somewhat significant of the notion entertained of *Warburg v. Tucker*. "We are all of opinion," he says, "that the 178th section of the 12 & 13 Vict. c. 106 does not apply to a case like this, and that a liability upon a guarantee under which goods are supplied after the bankruptcy is not discharged by the certificate of the surety." BYLES, J.—This is a case where the contingency has happened.] Yes: the covenant had been broken, and the plaintiff was compelled to pay the money before the bankruptcy.

*Hannen*, in reply.—There is a manifest difference between Government stocks and stock or shares in a trading Company. Every Court will presume that the Government will discharge its liabilities; but no such presumption can be made as to trading Companies. To constitute a debt that is provable, the value must be capable of estimation without the intervention of a jury. Can that be said of a contract to indemnify the plaintiff against his own primary liability? The dictum of Lord Justice Turner, in *Ex parte Bateman*, as to the cases of *Warburg v. Tucker* and *Young v. Winter*, was uttered before the former of those cases had been affirmed by the Exchequer Chamber. [WILLIAMS, J.—What do you say to the judgment of Coltman, J., in *Woolley v. Smith*, 3 C. B. 610 (E. C. L. R. vol. 54)? That is entitled to great respect as the deliberate judgment of three very eminent Judges.] That can hardly be considered as a *decision* upon the subject. It was unnecessary for the disposal of the point before the Court; and \*496] one \*of those learned Judges has on a later occasion,—in *Owen v. Routh*, 14 C. B. 327 (E. C. L. R. vol. 78),—given a somewhat different explanation of the Government stock cases, and that in a case where it was necessary to do so. *Curr. adv. vul.*

ERLE, C. J., now delivered the judgment of the Court:—

The plaintiff sued for six breaches of covenant, which for the pur-

pose of decision may be said to be in two classes. The first, second, third, and sixth breaches are assigned on covenants to replace amounts of preferential stock in the Oxford, Worcester, and Wolverhampton Railway on a given day; and the fourth is assigned on a covenant to pay to the plaintiff the dividends, if any, which should become due on such stock before that day. Those five breaches form one class.

The fifth breach is on a covenant to indemnify the plaintiff against calls, &c., made on certain shares in Wheal Guskine Mine, assigned to the plaintiff as a security for the replacement of the stock above mentioned, which calls had been made and paid by the plaintiff.

To these breaches the defendant pleaded his bankruptcy, and that the said causes of action accrued before his bankruptcy.

Upon demurrer to these pleas, the plaintiff has contended that his claim was not for a debt or demand provable under s. 165 of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, but for unliquidated damages: and he cited *Green v. Bicknell*, 8 Ad. & E. 701 (E. C. L. R. vol. 35), 3 N. & P. 634, where the amount due for not receiving a cargo of oil was held not provable, and *Taylor v. Young*, 3 B. & Ald. 521 (E. C. L. R. vol. 5), where the amount \*due for not indemnifying against the covenants in a lease was held [\*497 not provable.

He further contended that it was not provable as a liability to pay a debt or money on a contingency, under ss. 177 or 178,—as to which he is right.

To the first point the defendant has answered, that, as all the breaches were complete before the bankruptcy, the measure of damages in respect of each breach was as certain as it is in an action for the price of goods having a market value, or money paid to the use of the plaintiff, so that the amount of the claim might have been sworn to as a demand at the time of the bankruptcy; and that therefore it was provable under s. 165, and the pleas good.

In our opinion the defendant is right.

With respect to the breaches for the non-replacement of the stock above mentioned on the given days, the question is whether that stock had a market value at the time of the breach and of the bankruptcy: if it had, such market value would be the measure of the damages, and the amount of such damages would be a demand for a sum certain; and though in the technical sense of pleading it would not be a debt, we think it would be equivalent to a debt within the meaning of the Bankrupt Act, and be comprised under the word "demand."

We should presume that the preferential stock of a known railway had a market value on a day that is past, unless the contrary appeared: the more so, as the contract seems to show that the plaintiff treated it as having a market value. The transaction is, in substance, a loan. The covenant is, in substance, to secure the repayment thereof. The amount required for the loan may have been obtained by the sale of the stock: certain it is that the amount to be paid in satisfaction of the debt is to be ascertained by the \*purchase of stock on the [\*498 given day, instead of a repayment of a certain sum at the time fixed. On whatever day the plaintiff elects to have the damages assessed, the market value of the stock on that day settles the amount.

Although there is some apparent conflict in the application of the

principles which govern in these cases, there seems none in respect of the principles themselves, and none in respect of the intention of the legislature to clear the bankrupt effectually from pecuniary liability.

If the amount due for damages for breach of contract can be ascertained with reasonable certainty without the intervention of a jury, we take it to be established that such amount may be proved as a demand. Also the importance is apparent of the distinction between breaches of contract before the bankruptcy and those after it, in respect of facility for ascertaining such amount. In *Utterson v. Vernon*, 3 T. R. 539, the amount of damages due for not replacing Government stock was held to be provable because it could be ascertained: and in the same case in 4 T. R. 570, the same claim was held not to be provable, because the breach had not occurred before the bankruptcy. In *Taylor v. Young*, 3 B. & Ald. 521 (E. C. L. R. vol. 5), a claim upon a bond conditioned to indemnify a lessee against breaches of the covenants in his lease, was held not provable in respect of breaches before the bankruptcy, because the bond would continue in force for breaches subsequent thereto, and a partial proof confined to those before, under such a bond, would not be admitted. In *Green v. Bicknell*, 8 Ad. & E. 701 (E. C. L. R. vol. 35), 3 N. & P. 634, these principles are clearly stated in argument, and well supported by authority, by Mr. Robinson for the plaintiff; and the judgment for the \*499] defendant affirms them, but denies their application to "the breach of the contract there in question, viz., the non-acceptance of a cargo of oil. The Court holds that, in that case, the intervention of a jury might be requisite for settling the amount; "for, every one of the data which form the basis of the calculation may be denied and disputed, and is the subject of opinion rather than a direct decision of facts."

Our judgment does not conflict with this case in respect of the principles which govern; and it is not necessary for us to say how we should have applied those principles, if the facts of that case were before us for adjudication.

These principles are again clearly recognised and rationally applied in the sound judgment of Lord Justice Turner, in *Ex parte Bateman*, in re Routledge, 25 Law J., Bankruptcy 19. There, the bankrupt received timber to be sawed, and contracted to insure it against loss by fire. The timber was burnt before bankruptcy, and was not insured: and the Lords Justices decided that the owner of the timber was entitled to prove for his claim for the breach of the contract to insure. The quantity of the timber had been ascertained before the bankruptcy. It was proved to have a market value, that is, it was a commodity of known quality, of which there was a constant regular supply in the market. The amount due for not insuring was precisely the same as would have been due for the same quantity of timber sold and delivered. It was held, therefore, to be equivalent to a debt, though technically a right to damages. Being equivalent to a debt, it was a demand, and might be proved.

If we are right in assuming that the preferential stock in this case has a market value in the sense above mentioned, the decision in *Ex parte Bateman* is decisive of the present action, so far as relates to the

\*non-replacement of the preferential stock on the appointed day. [\*500

Then with respect to the count for non-payment of the dividends that were paid by the Railway Company during a certain time, and with respect to the count for calls paid by the plaintiff before the bankruptcy, the amount of the claim is even more clearly ascertained by simple addition than the amount of the claim for not replacing stock, and therefore is a provable claim.

The case of *Warburg v. Tucker*, 5 Ellis & B. 384 (E. C. L. R. vol. 85), is consistent with this judgment. There, the covenants to pay premiums on a life policy, and to repay premiums if paid by the plaintiff, had not been broken before the bankruptcy. The judgment is founded on the distinction that the breach was not before bankruptcy, and it therefore by implication declares, that, if the latter breach had taken place before the bankruptcy, the amount would have formed a provable claim.

For these reasons, our judgment is for the defendant.

Judgment for the defendant.

\*BLADES v. HIGGS and Another. Feb. 7. [\*501

Held,—on the authority of *Rigg v. The Earl of Lonsdale*, 1 Hurlst. & N. 923,†—that the owner of land has a property in game killed thereon.

THE first count of the declaration charged that the defendants converted to their own use, or *wrongfully deprived the plaintiff of the use and possession of*, (a) the plaintiff's goods, that is to say, rabbits and dead rabbits. The second count stated that the defendants assaulted and beat and pushed about the plaintiff, and took from the plaintiff the plaintiff's goods, that is to say, rabbits and dead rabbits: And the plaintiff claimed 20*l*.

The defendants pleaded,—first, not guilty,—secondly, to all but the assaulting, beating, and pushing the plaintiff, that the said goods were not, nor were any of them, the plaintiff's, as alleged,—thirdly, as to the assaulting, beating, and pushing the plaintiff, that the plaintiff, at the said time when, &c., had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter, and the said rabbits were then in the possession of the plaintiff without the leave and license and against the will of the said marquis, and the plaintiff was about wrongfully and unlawfully to take and carry away the said rabbits, and convert the \*same to his own use; whereupon the defendants, as the servants of the said marquis, and by his [\*502 command, requested the plaintiff to refrain from carrying away and converting the said rabbits, and to quit possession thereof to the

(a) It is somewhat singular that pleaders will pertinaciously adhere to the typographical blunder in the 28th form given in Sched. B. to the Common Law Procedure Act, 1852 (although it has been so often pointed out), and still persist in drawing the count for a conversion with an alternative. It was intended to run thus,—“That the defendant converted to his own use [or, “wrongfully deprived the plaintiff of the use and possession of”] the plaintiff's goods, that is to say, &c. &c. See Day's Common Law Procedure Acts, 189 n.

The form given in Bullen & Leake, p. 173, unwarrantably substitutes “and” for “or.”

defendants as such servants, which the plaintiff refused to do; and thereupon the defendants, as the servants of the said marquis, and by his command, gently laid their hands upon the plaintiff, and took the said rabbits from him, using no more force than necessary; which were the alleged trespasses.

The plaintiff joined issue on all the pleas, and also demurred to the third plea, on the ground that, except under peculiar circumstances, the right of recaption cannot be exercised when it cannot be effected without an assault or other force.<sup>(a)</sup>

The issues of fact came on to be tried before Willes, J., at the last Summer Assizes for the county of Leicester, when the following facts appeared in evidence:—The plaintiff is a fishmonger and licensed dealer in game at Stamford, in the county of Lincoln; and the defendants, William Higgs and Thomas Percival, are, the former the steward, and the latter a servant in the employ of the Marquis of Exeter. Between 7 and 8 o'clock in the morning of the 16th of October, 1860, the plaintiff bought of a man named Yates two bags containing about ninety rabbits, and ordered them to be consigned to him at the Midland station at Stamford. The plaintiff, upon the purchase, paid 4*l.* 15*s.* for the rabbits. A few minutes before 9 \*503] o'clock the same morning, the plaintiff went to the \*Midland station with a barrow for the purpose of bringing the rabbits away to his shop. The bags arrived, directed to the plaintiff, with one of his own printed labels; and the plaintiff paid 4*s.* for the carriage of them to Stamford, and they were delivered to him. As he was proceeding to put the two bags in the barrow, and before he had got them on, the defendant Higgs came up to the plaintiff and said he wanted to see what was in the bags, to which the plaintiff said he should not allow him; and, with the assistance of a porter, the plaintiff lifted the bags on the barrow. The defendant Higgs remained there until two policemen came, and then he directed them to see what the bags contained. The plaintiff said he might. One of the policemen looked into them; and, seeing that they contained dead rabbits, he allowed the plaintiff to take them, and assisted him in putting them back on the barrow. The other defendant, Percival, then came up, and said, "I shall take these rabbits; they are mine;" and the defendant Higgs said also, "They are the Marquis of Exeter's." The defendants then attempted to get possession of the bags, and the plaintiff resisted for some time, until at length one of the policemen saying to him it was no use his struggling any longer, he discontinued his resistance, and the defendants took possession of the bags and their contents. Another game-dealer in the town, named Pollard, was fetched to the spot to buy the rabbits; and they were sold to him by the defendants, the plaintiff protesting against the sale of his property. The two bags were directed to the plaintiff, and had been sent from the Ketton station on the Midland Railway.

The counsel for the defendants proposed to prove on their behalf that the persons who transmitted the rabbits to the plaintiff went

(a) The third plea was held to be good, on the ground that the owner of goods (or his servant acting by his command) which are wrongfully in the possession of another, may justify an assault in order to repossess himself of them, no unnecessary violence being used. 10 C. B. N. S. 713 (E. C. L. R. vol. 100).

upon the Marquis of \*Exeter's land and took the rabbits, and killed them and put them into the bags there, and then carried [\*504 them to the railway station at Ketton; and he contended that the property in the rabbits was in Lord Exeter, and that the defendants, acting under his authority, were justified in the course they adopted.

The learned Judge instructed the jury in substance as follows:—  
 “A man's property in the land does not give him any right of property in animals of a wild nature upon the land after they have become old enough to escape from it. According to Lord Coke's Institutes, a man has no property in a wild animal when it is no longer in his power to restrain it. There are many very curious decisions on that branch of the law,—as, for instance, that the owner of a hawk retains his property in it only so long as he can lure it back. As to young animals, a greater property may be acquired in them; for, they may be taken out of the nests: but, so soon as they are able to escape on to another man's land, the property in them is gone. A man can have no more right to a rabbit than he has to a sparrow on the land of another. It is, I own, very difficult to make any sensible distinction; and, for myself, I never could see the distinction between a pheasant and a fowl which I choose to rear and encourage on my land. I never could see the distinction between the pheasant preserved and fed on my land and the barn-door family: but there is that distinction in the law; and I am bound to administer the law as I find it. The whole theory of the game laws is founded on there being no permanency in property of this description. One who enters on the land of another without license is a trespasser. The proofs may be as large as the defendants wish: but, if a person goes on to the land of the Marquis of Exeter and kills a rabbit or any number of rabbits, and \*carries them away and sells them to a fishmonger, the [\*505 Marquis of Exeter's servants have no right to go to the fishmonger's and take them from him. The property in the rabbits would be in the fishmonger, though the taking them was an act of trespass. He might be subject to the game laws. It is not like felling a tree, and then carrying it off the land. If these rabbits were the property of Lord Exeter at the time they were seized, the defendants would be justified in seizing them. But, were they Lords Exeter's? The learned counsel for the defendants proposed to show that certain poachers were in Lord Exeter's grounds, and took the rabbits in question, and sent them from Ketton station to Stamford, and therefore they were the property of that nobleman, and he had a right by the hands of his servants to take them back. I think not. The learned counsel has read a passage from a book of repute, which he thinks supports his view of the law. But the bent of my opinion is far too strong and has existed too long a time to induce me to entertain a doubt about it. My notion is, that a person who kills wild animals, such as rabbits, on the land of another, is liable as for a trespass at the instance of the owner of the land, under the game laws, or to an action. I repeat, I never could understand why such a law should exist: because, if a man has land, and chooses to rear pheasants and what not upon it, and incurs the labour and expense of feeding and preserving them (at much more cost than ordinary barn-door fowls), I could never understand why the law as to larceny should not

apply to them. According to all principle and reason, they should belong to the man who created the property, just as much as domestic poultry. The result is that I rule, that, in point of law, the plaintiff \*506] was entitled to the rabbits in question, and that the defendants were not justified in taking them from him.

The jury thereupon returned a verdict for the plaintiff, with 6*l.* 10*s.* damages.

*Macaulay*, Q. C., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the learned Judge misdirected the jury, in telling them that the facts relied upon by the defendants, if taken as proved, did not constitute evidence that the right to the possession of the rabbits was in the Marquis of Exeter. He referred to *Sutton v. Moody*, 1 *Ld. Raym.* 250, 2 *Salk.* 556, 3 *Salk.* 290, 5 *Mod.* 375, 12 *Mod.* 144, *Comb.* 458, *Comyns* 34, *Holt* 608 (*E. C. L. R.* vol. 3), *Churchward v. Studdy*, 14 *East* 249, *The Earl of Lonsdale v. Rigg*, 11 *Exch.* 654,† and the same case in error, *Rigg v. The Earl of Lonsdale*, 1 *Hurlst. & N.* 923.†

*Hayes*, Serjt., showed cause.—The defendants claim a right to retake the rabbits in question as chattels. This, it is submitted, is opposed to all the authorities. Much reliance is placed upon the dictum of *Holt*, C. J., in *Sutton v. Moody*, 1 *Ld. Raym.* 250.(a) That was trespass quare clausum suum fregit, et centum cuniculos suos adtunc et ibidem inventos venatus fuit, occidit, cepit, et asportavit. Upon not guilty pleaded, a verdict was found for the plaintiff, and entire damages. *Gould*, Serjt., moved in arrest of judgment, that conies are feræ naturæ, and therefore there is no property in them in any; therefore, since the plaintiff has laid property in them by the word *suos*, it is ill, and no damages ought to have been given for \*507] them. But, if the action had been for having hunted in warrenna sua, and killed cuniculos suos there found, it had been good, for then he would have had a privileged property in them. The same law for fish taken in separali piscaria. *F. N. B.* 87; *Child v. Greenhill*, *Cro. Car.* 553, *March.* 48, *W. Jones* 440. But, generally, there is no property in those things which are feræ naturæ, and therefore trover does not lie for a hawk, without alleging that he was reclaimed; and in such an action it was adjudged against the plaintiff, though it was alleged in the declaration that he was possessed of the hawk as of his proper goods: *Dyer* 306, b. pl. 66. Sed non allocatur: for, per *Holt*, C. J., “a warren is a privilege to use his land to such a purpose: and a man may have warren in his own land, and he may alien the land and retain the privilege of warren. But this gives no greater property in the conies to the warrener, for the property arises to the party from the possession; and therefore, if a man keeps conies in his close (as he may), he has a possessory property in them so long as they abide there: but, if they run into the land of his neighbour, he may kill them, for then he has the possessory property. If A. starts a hare in the ground of B., and hunts it and kills it there, the property continues all the while in B. But, if A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A., the hunter, but A. is liable to an action of tres-

(a) *S. C.* 2 *Salk.* 556, 5 *Mod.* 375, *Comb.* 458, *Comyns* 34, 12 *Mod.* 144, *Holt* 608 (*E. C. L. R.* vol. 3), 3 *Salk.* 290.

pass for hunting in the grounds as well of B. as of C. But, if A. starts a hare, &c., in a forest or warren of B., and hunts it into the ground of C., and there kills it, the property remains all the while in B., the proprietor of the warren, because the privilege continues. And these distinctions Holt, C. J., took upon the authority of 12 H. 8, fo. 9. And by the whole Court, \*judgment was given for the plaintiff, because he had a property by the possession." A [\*508 correct representation of the case in the Year Book is given in 12 Mod. 145, where Holt, C. J., is reported to have said,—“When we gave judgment in this case, I mentioned 12 H. 8, fo. 9, which was this: One hunted in a forest and roused a deer therein, and ran him into another man's ground, and the forester made fresh pursuit; and it was held, that, in regard the forest was a place of privilege, the forester making fresh pursuit, he may retake the deer in another man's ground. They held also, that, if a man start game in his own ground, and hunt it into his neighbour's ground, and there kill it, yet, in regard of his first starting and pursuit, the property is still in him; and it may be inferred from that case, that, if I start game in one man's ground which is not my own, and hunt it into another man's ground, and there kill it, the property is in me, because the party in whose ground it was started having no privilege, he cannot come and take it.” He also refers to a case of *Ashford v. Pollexfen* (a) and *Mallocke v. Eastly*, 3 Lev. \*227, “trespass quare piscatus est in piscariâ, without saying ‘separali’ or ‘liberâ,’ and pisces suos cepit, which [\*509 after verdict was held well; though in a several fishery the fish are as much at liberty as game on any common ground.” [WILLES, J.—The dictum of Lord Holt in *Sutton v. Moody* is affirmed by Martin, B., in *Graham v. Ewart*, 11 Exch. 326, 346,† where he says: “As to the general law on the subject of game, no difference existed at the bar. Game are *feræ naturæ*, and the property in them is a temporary property, consequent upon the possession of the soil. So long as they remain upon a man's land, they belong to him; but, when they run or fly out of it, his property is at an end and gone: *Sutton v. Moody*, 1 Ld. Raym. 250; *Churchward v. Studdy*, 14 East 249.” That was a judgment of the whole Court. Is not the point settled by the decision of the Exchequer Chamber in *Rigg v. The Earl of Lonsdale*, 1 Hurlst. & N. 923 ?† In the Court below,—*The Earl of Lonsdale v. Rigg*, 11 Exch. 654, 671,†—Martin, B., says: “The property in wild grouse is not absolute in any one: it is a wild bird, *feræ naturæ*. So long as the grouse is upon a man's land, he has a possessory property in it: but, as soon as it flies or goes off his land, his property is gone.” He then refers

(a) This case is reported in 1 Ventris 122, by the name of *Pollexfen v. Ashford*. The plaintiffs brought trespass quare pisces suos cepit in separali piscariâ. Upon not guilty pleaded, and verdict for the plaintiffs, it was moved in arrest of judgment, that the plaintiffs ought not to have called them pisces suos, unless they had been in a trunk or pond; for, there is no more property in fishes in a several fishery than in a free fishery. In an action for taking conies in a warren, he shall not say cuniculos suos: and this is such a default as the verdict shall not aid. Sed non allocatur: for, the Chief Justice (Holt) said “It might be intended a stew pond, which is a man's several piscary; and, after a verdict, the Court shall admit any intendment to make the case good.” And Twisden cited a case which was in trespass quare phasianos suos cepit, and the plaintiff had judgment after verdict; for, it shall be intended they were dead pheasants. And the case of *Child v. Greenhill*, Cro. Car. 553, is the same with this. But the Court held that it had been good upon a demurrer, by reason of the local property.

And see *Fondleroy v. Aylmer*, 1 Ld. Raym. 239.

to Lord Holt's dictum in *Sutton v. Moody*, and adds,—“This view of the law was adopted by the Court of King's Bench in *Churchward v. Studdy*, 14 East 249. The right, at common law, therefore, to such animals is very peculiar. So long as they remain upon a man's land, they belong to him; but the moment they leave his land, his property is gone: and this is so, even if they be hunted out of his land by a \*510] trespasser, and \*although they be killed by the trespasser on another man's land: the continued pursuit gives the property in the animals to the trespasser, in exclusion of the person in whose land they are killed.”] No authorities are cited in the judgment of the Court of error. [WILLIAMS, J.—The Exchequer Chamber there certainly never intended to decide this point. I was one of the Judges present there. All who have lectured on or taught the law of England for the last century have adopted Lord Holt's doctrine on the subject. The Court of error never dreamt of disputing it in *Rigg v. The Earl of Lonsdale*. KEATING, J.—Can a poacher be indicted for larceny in killing and carrying away game?] Clearly not. [KEATING, J.—Platt, B., in *The Earl of Lonsdale v. Rigg*, 11 Exch. 679,† says: “Nobody can doubt that trover would lie for dead grouse, or that an indictment would lie for stealing a quantity of grouse from a poulterer's.”] If the grouse had been in the possession of Lord Lonsdale after they had been killed, no doubt he might have maintained trover for them. The whole case proceeded upon the notion that they were dead grouse in the possession of the Earl of Lonsdale,—upon the principle stated in the case in the Year Books (M. 12 H. 8, fo. 9), that the plaintiff should have alleged in his writ “quare carnes crudas cepit, &c., et nemy quare cervum mortuum cepit et asportavit, quia cervus mortuus non cervus, sed est quoddam mortuum et caro; sicut homo mortuus non est homo.” Here, the rabbits never were in the possession of the Marquis of Exeter. [WILLIAMS, J.—Right or wrong, Coleridge, J., in delivering the judgment of the Court of error in *Rigg v. The Earl of Lonsdale*, says: “The grouse shot (by the defendant) on the land of the plaintiff belonged to him (the plaintiff), according to all the authorities.”] The only question which was \*511] argued there was as to the ownership of the \*soil: not the slightest reference was made to the property in the game, except as involving the ownership of the soil. It clearly, therefore, is not a decision binding upon the Court on the point now under consideration.

*Macaulay*, Q. C., and *Field*, in support of the rule, were not called upon.

WILLIAMS, J.—I am of opinion, and my learned Brothers agree with me, that we are bound by the authority of the case of *Rigg v. The Earl of Lonsdale*, 1 Hurlst. & N. 923;† but, at the same time, we are quite willing to give the plaintiff leave to appeal. The Court of error there considered the very point now before us, and, nobody disputing it, gave judgment affirming the property in game killed on the land to be in the owner of the soil. The rule for a new trial, therefore, must be absolute,—with leave to appeal.

WILLES, J.—I am of the same opinion. I think it is impossible for us to get over the authority of the case of *Rigg v. The Earl of Lonsdale*. If this case should be argued in the Exchequer Chamber, it

might be as well to compare the dictum of Lord Holt in *Sutton v. Moody* with the passage in Justinian's Institutes, Lib. II., Tit. I., § 12, — "*Feræ igitur bestię et volucres et pisces, id est, omnia animalia quę mari, cœlo, et terra, nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur. Nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno. Plane qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi ne ingrediatur. Quidquid autem eorum ceperis eousque \*tuum esse intelligitur, donec tua custodia coercetur; cum vero evaserit custodiam tuam, et in [\*512 naturalem libertatem se receperit, tuum esse desinit, et rursus occupantis fit. Naturalem autem libertatem recipere intelligitur, cum vel oculos tuos effugerit, vel ita sit in conspectu tuo, ut difficilis sit ejus persecutio.*" It is there distinctly laid down that the person who takes and reduces into possession any wild animal, whether on his own land or on the land of another, acquires the property in it. That undoubtedly was the rule of the Roman law, and of the laws of all countries who have adopted the Roman law: and it may be well to consider whether the dictum of Lord Holt in 1 *Ld. Raym.* 250, is correctly reported. In *The Case of Swans*, 7 *Co. Rep.* 15 b, 17 b, Lord Coke says: "There are three manner of rights of property, scil. property absolute, property qualified, and property possessory. A man hath not absolute property in anything which is *feræ naturæ*, but in those which are *domitæ naturæ*. Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain in two ways, by industry, or *ratione impotentię et loci*; by industry, as, by taking them, or by making them *mansueta*, i. e. *manui assueta*, or *domesticę*, i. e. *domui assueta*: but, in those which are *feræ naturæ*, and by industry are made tame, a man hath but a qualified property in them, scil. so long as they remain tame, for, if they do attain to their natural liberty, and have not *animum reverendi*, the property is lost, *ratione impotentię et loci*; as, if a man has young shovellers or goshawks, or the like, which are *feræ naturæ*, and they build in my land, I have possessory property in them, for, if one takes them when they cannot fly, the owner of the soil shall have an action of trespass *quare boscum suum fregit, et tres pullos espervor' suor', or ardear' suar' pretii \*tantum, nuper in eod' bosco nidific-* [\*513 *cant', cepit et asportavit*: and therewith agreeth the Register and [*F. N. B.* 86 L, and 89 K, 10 E. 4, fo. 14, 18 Ed. 4, fo. 8, 14 H. 8, fo. 1 b, *Stamf.* 25 b. *Vide* 12 H. 8, fo. 4, and 18 H. 8, fo. 12. But, when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, &c., he hath not any property in the deer, or conies, or pheasants, or partridges; and therefore, in an action *quare parcum, warrennum, &c.*, *fregit et intravit, et tres damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say '*suos*,' for, he hath no property in them, but they do belong to him *ratione privilegii* for his game and pleasure, so long as they remain in the privileged place: for, if the owner of the park dies, his heirs shall have them, and not his executors or administrators, because without them the park, which is an inheritance, is not complete; nor can felony be committed of them, but of those which are made tame, in which a man by his

industry hath any property, felony may be committed." So, one who has a decoy, has, *ratione solæ*, a right to the natural advantages of his land, which is not to be invaded; but he has no property in the ducks until they are caught. It would seem to follow that there can be no right to game as chattels. The doctrine of Lord Coke in *The Case of Swans* is adopted in 1 Williams on Executors, 5th Edit. 626. However, we must hold ourselves bound by the decision of the Exchequer Chamber in *Rigg v. The Earl of Lonsdale*, 1 Hurlst. & N. 923,† and therefore the present rule must be made absolute for a new trial on the ground of misdirection.

BYLES, J.—I also am of opinion, that, as the authorities now stand, they are too strong for us to get over. Questions of this sort have frequently arisen with regard to the salmon rivers in Scotland.  
 \*514] \*The general law is that the salmon, like other things that are *feræ naturæ*, belongs to the captor. And that, I believe, is the general law of continental Europe. Another reason why there should be leave given to the plaintiff in this case to appeal, is, that an extremely doubtful question was raised by the demurrer.

KEATING, J.—I agree with the rest of the Court in thinking that the case of *Rigg v. The Earl of Lonsdale* is precisely in point, and leaves us no discretion. Rule absolute accordingly.(a)

(a) The case is now pending in the Exchequer Chamber.

### ANDREW v. MOTLEY. Feb. 6.

A will is not revoked by mere abandonment: to operate a revocation, there must be some unequivocal act of cancellation or obliteration by the testator himself or by some person in his presence and by his direction.

A will (about seventy years old) executed under seal, and published and attested as a sealed instrument, was proved to have been in the keeping of the person entitled under it as tenant for life, and he was shown to have treated it as his title-deed, and, shortly before his death, to have desired a person to read it over in order to see whether he was empowered by it to dispose of the property by his will:—Held, that it was properly received in evidence, as a document coming from a custody where it might reasonably be expected to be found,—notwithstanding its appearance was calculated to lead to a suspicion (which, however, the jury negatived) that it had been cancelled by the testator after its execution.

*Semble*,—per Williams, J.,—that, where the attestation clause of a will more than thirty years old recites a compliance with the requisite ceremonies in respect of all the witnesses, it is enough, in order to make out a *prima facie* case, to prove the death of all and the handwriting of one of them; because it will be presumed that everything that he thus declared by his attestation to have been done was rightly done.

THIS was an action of ejectment brought to recover the possession of cottages and land in the parish of Coningsby, in the county of Lincoln.

The cause was tried before Pollock, C. B., at the Summer Assizes at Lincoln, in 1861, when the following facts appeared in evidence:—

James Andrew, who resided at Friskney, near Wainfleet, in the county of Lincoln, by a will dated the 14th of June, 1786, devised and bequeathed as follows:—

"First, I give, devise, and bequeath to my brother John Andrew, of Brig, in the county of Lincoln, labourer, one shilling. Item: I give, devise, and bequeath to my brother Robert Andrew, of Gould,

nigh \*Holden, in the county of York, labourer, 10*l.* of good and lawful money of Great Britain: but, if my said brother Robert should die before my decease, then my will is that 5*l.* of the last-bequeathed 10*l.* legacy shall devolve and be given to my nephew Robert Andrew, the son of my brother Thomas Andrew, of Snitterby, in the county of Lincoln, hereinafter mentioned, and the other 5*l.*, the other part of the said 10*l.* above bequeathed to my brother Robert Andrew, I give, devise, and bequeath to my nephew Robert Andrew, the son of my brother Richard Andrew, of Snitterby, in the county of Lincoln, hereinafter mentioned, provided my said brother Robert should die before my decease. Item: I give, devise, and bequeath to Ann Andrew, daughter of my brother George Andrew, late of Gosberton, in the county of Lincoln, deceased, one shilling. Item: I give, devise, and bequeath to my brother Richard Andrew, of Snitterby, in the county of Lincoln aforesaid, all that house, yard, garden, lands, and appurtenances thereunto belonging, and which I now hold under lease of the demesnes of Lincoln Cathedral at and under the rent of 2*s.* 6*d.*, payable yearly, To have and to hold the said reversionary, with the lease and profit arising therefrom, unto him my said brother Richard during his natural life and the natural life of Jane the wife of the said Richard Andrew; and, at the decease of both of them, whichever may be the longer liver, my will is, that then that the said house, yard, garden, and appurtenances, on which said premises my said brother Richard now liveth, together with the lease and profits arising therefrom, I give, devise, and bequeath to my nephew James, the son of my brother Thomas Andrew, of Snitterby aforesaid. Item: I give, devise, and bequeath to Sarah Marshal, of Snitterby, in the county of Lincoln aforesaid, widow, my sister, 1*l.* Item: I give, \*devise, and bequeath to William Marshal, son of the aforesaid Sarah Marshal, now a servant, 5*l.* of good and lawful money of Great Britain; but, if he the said William Marshal should die before my decease, that then the aforesaid legacy of 5*l.* shall be given to his sister Mary Marshal. Item: I give, devise, and bequeath to Francis Andrew, of Friskney, grazier, one shilling. Item: I give, devise, and bequeath to James Legard, now of Kirton (otherwise James Andrew), son of Elizabeth Legard, late of Friskney aforesaid, all those three messuages or tenements, and two acres of land, be the same more or less, lying and being in the parish of Coningsby, abutting on the Witham Bank south, and north on the Wilmore Fenn, and now in the several tenures of William Moore, John Motley, and other under-tenants, during his natural life, and from thence to pass to heir and heirs for ever, without any power to sell, mortgage, or convey for longer than each heir may for his or her own natural life. But if the said James Legard (otherwise Andrew) should die without issue, I then give, devise, and bequeath the said three messuages or tenements and two acres of land, be the same more or less, lying and being in Coningsby aforesaid, to my nephew James Andrew, son of Thomas Andrew, of Snitterby aforesaid, To have and to hold the same during his natural life, and from thence to pass to his heir and heirs for ever, without any power to sell, mortgage, or convey for longer than each heir may for his or her own natural life. And I also appoint Robert Walker, of Friskney, grazier, to be executor in

trust for the said James Legard (otherwise Andrew), to act with power as he shall deem most proper. The rest, residue, and remainder of my estate, with my goods and chattels, plate, and whatsoever and \*517] wheresoever to me appertaining or belonging, I give, devise, and bequeath to my brother Thomas Andrew, of Snitterby aforesaid, whom I constitute and appoint whole and sole executor of this my last will and testament, he paying my just debts, legacies, and funeral expenses."

This will was produced from the Consistory Court of Lincoln. The plaintiff claimed as heir at law of the devisee in remainder. The witnesses were,—*Thomas Cousins*, John Marfoot, and Thomas Adkins.

Upon the death of the testator, James Legard, the tenant for life, entered into possession of the premises in question, and continued therein until his death (intestate and without issue) in 1857.

The defendant claimed under a subsequent supposed will of James Andrew, dated the 4th of June, 1788, which, it appeared, was found by the housekeeper of James Legard, after his death, in a box with the probate of the first will and other papers, and was handed by her to John Marshall, who was the heir at law of the devisee in remainder in the second will mentioned, and who was the real defendant in this cause. The second will was as follows:—

"I, James Andrews of Foston, otherwise Friskney, in the county of Lincoln, being of sound mind, memory, and understanding, do make, ordain, constitute, and appoint this my last will and testament in manner and form following, viz., Imprimis, I give, devise, and bequeath to James Ledger, the son of Elizabeth Ledger, of Friskney aforesaid, all that messuage, tenement, and boot-yard, situate, lying, and being at Snitterby, in the county of Lincoln aforesaid, and which I now hold under lease of the executors in trust of the Cathedral Church of Lincoln, To have and to hold the same with proper renewances thereof, unto him the said James Ledger, with full power hereby to sell out or otherways at any time to dispose of the same: but, if \*518] the said James Ledger should die without issue, not \*having disposed of the said lease, that then my will is, the said lease, with proper renewances, shall devolve to and become the right of James Andrews, the son of Thomas Andrews, of Snitterby, in the county of Lincoln aforesaid. Item: I give, devise, and bequeath to James Ledger, of Friskney, in the county of Lincoln aforesaid, and now boarded at Kirton, nigh Boston, all those three messuages or tenements, with each and every of their appurtenances, situate, lying, and being at Coningsby, in the county of Lincoln aforesaid, and now in the several tenures of John Motley, Thomas Sands, and Thomas Blackburne, To have and to hold the same to him the said James Ledger aforesaid, and to his heirs, for ever. And my will further is, that the aforesaid three tenements lying and being in Coningsby aforesaid shall not be sold or by any means otherways disposed of until the said James Ledger shall have issue born in wedlock. And provided the said James Ledger should die without issue, then my will is that the afore-mentioned three tenements lying and being in Coningsby aforesaid, with their appurtenances, shall devolve to and become William Marshall's (the son of my sister Sarah Marshall, of Snitterby, in the county of Lincoln aforesaid), and to his heirs for

ever. Item: I give, devise, and bequeath to my brother John Andrews, of Brig, in the county of Lincoln, one shilling. Item: I give, devise, and bequeath to my brother Joseph Andrews, of Snitterby aforesaid, one shilling. Item: I give, devise, and bequeath to my brother Robert Andrews, in the parish of Gould and county of York, one shilling. Item: I give, devise, and bequeath to my niece Ann Andrews, of Gosberton, in the county of Lincoln aforesaid, one shilling. Item: I give, devise, and bequeath to my brother Richard Andrews, of Snitterby aforesaid, one shilling. Item: I give, devise, \*and bequeath to my sister Sarah Marshall, of Snitterby aforesaid, one shilling. Item: I give, devise, and bequeath to my [\*519 brother Francis Andrews, of Friskney aforesaid, one shilling. Item: I give, devise, and bequeath to my brother Thomas Andrews, of Snitterby aforesaid, one shilling: the last eight legacies of one shilling each to be paid to each of the legatees by my executor in trust hereafter mentioned immediately after my decease. And I do hereby constitute, nominate, and appoint Mr. Robert Walker, of Friskney, my executor in trust for the said James Ledger, and to receive the rents and profits of the aforesaid devised lands for the use of the said James Ledger until he shall arrive at twenty-one years of age: and provided the said Mr. Robert Walker should die before the said James Ledger shall attain the age of twenty-one years, then I hereby authorize and appoint Mr. John Walker executor in trust, with full power to act as aforesaid. The rest, residue, and remainder of my estate, both real and personal, with my goods and chattels, plate, jewels, notes, bonds, arrears of rent, lands, and tenements, whatsoever and wheresoever, to me appertaining or belonging, I give, devise, and bequeath to James Ledger, of Friskney aforesaid, whom I do hereby constitute, nominate, and appoint whole and sole executor of this my last will and testament, declaring, ratifying, and confirming this and no other to be my last will and testament."

The witnesses to this will were, Thomas Cousins, Samuel Dickens, and Robert Pasmidge.

On the part of the plaintiff, it was objected that this second will did not come from such a place of custody as afforded any presumption of its genuineness, and therefore did not come within the rule in favour of instruments of ancient date; that, upon the face of it, independently of the improbability of James Legard \*having (without [\*520 any apparent motive) so long concealed a genuine document, it teemed with suspicion; and that its appearance,—the seal, formed by turning down a portion of the paper over a wafer, having evidently been torn off,—indicated, that, if a genuine will, the testator had intended to destroy it.

For the defendant it was insisted that there was nothing in its appearance, or in the place where it was found, to impeach the genuineness of the second will.

The Lord Chief Baron, in the course of his summing up, told the jury that the will of 1788 ought to have been proved in such a manner as not to leave any doubt of its genuineness upon their minds, and that they might infer from the lapse of time that the testator had intended to recall it, and treated it as a nullity, or that he had given it to his son (James Legard) in order that he might destroy it.

The jury having returned a verdict for the plaintiff,

*Mellor*, Q. C., for the defendant, in Michaelmas Term, 1861, obtained a rule nisi for a new trial, "on the ground that the Lord Chief Baron misdirected the jury in leaving as a question of intention to them whether the second will was intended to be acted upon or intended to be revoked, or that the lapse of time amounted to a revocation," and also on the ground that the verdict was against the weight of evidence. He referred to *Doe d. Reed v. Harris*, 6 Ad. & E. 209 (E. C. L. R. vol. 33), 1 N. & P. 405 (E. C. L. R. vol. 36), and *Marston v. Roe d. Fox*, 8 Ad. & E. 14, 56 (E. C. L. R. vol. 35), 2 N. & P. 504.

*Hayes*, Serjt., and *Beasley*, in Hilary Term last, showed cause.—Upon the whole of the summing up, fairly looked at, the substantial question left was, whether the second will was a genuine document. It \*521] was the duty of Legard, as executor, to prove it, if genuine; and his interest also, seeing that under that will he would have taken the leasehold as well as the freehold. The proper place of custody for such a document would have been the Consistory Court of Lincoln. [BYLES, J.—It is not necessary that the place of deposit should be the best and most proper, to make it receivable.] In *The Bishop of Meath v. The Marquis of Winchester*, 4 Clark & F. 445, 539, 3 N. C. 183, 200 (E. C. L. R. 32), 3 Scott 561, 578 (E. C. L. R. vol. 36), where this matter underwent much discussion, Tindal, C. J., in delivering the unanimous opinion of the Judges, says,—“The result of the evidence upon the bill of exceptions, we think, is this, that these documents were found in a place in which, and under the care of persons with whom, papers of Bishop Dopping might naturally and reasonably be expected to be found; and that is precisely the custody which gives authenticity to documents found within it; for, it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity: but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for, it is obvious, that, whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases the proposition to be determined, is, whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument \*522] found in such custody must be genuine. \*That such is the character and description of the custody which is held sufficiently genuine to render a document admissible, appears from all the cases.”(a) Amongst other facts which the learned Judge observed upon, was, the different spelling of the testator's name in the two documents, the final *s* appearing only in the second will. [WILLIAMS, J.—Shakspeare's name is spelt in three different ways in that which is his undoubted will.] The question really intended to be submitted

(a) The cases referred to were,—*Lygon v. Strutt*, 2 Anstr. 601, *Swinerton v. The Marquis of Stafford*, 3 Taunt. 91, *Bullen v. Michel*, 2 Price 399, 4 Dow 297, 321, *Jones v. Waller*, 3 Gwill. 847, *Bertie v. Beaumont*, 2 Price 303, and *Michell v. Rabbetts*, cited 3 Taunt. 91.

to the jury, was, whether or not the second will was a genuine document. [WILLIAMS, J.—Suppose the jury declined to consider whether the will was genuine or not? The learned Chief Baron suggested to them that it might have been given to James Legard to destroy. They have not found that the testator did any act which amounted to a revocation.]

*Macaulay*, Q. C., and *Field*, in support of the rule, were stopped by the Court.

WILLIAMS, J.—I am of opinion that there must be a new trial in this case. The summing up leaves no doubt upon my mind that the jury could hardly fail to understand, that, if abandoned by the testator, the will was to be treated as a nullity; and still more, if they thought the testator had given it to his son for the purpose of destroying it. It is quite possible that the jury may have taken the law to be so. That is manifestly a mistaken view. I do not understand the Lord Chief Baron to have laid that down in a deliberate manner. But he certainly did say that which was \*calculated to induce the jury to believe that to be the law. And, as the existence of [\*523 two wills having so many points of resemblance was a puzzle to them, they probably adopted that as a ready mode of getting over the difficulty. It is clear that a man cannot simply abandon a will, without more. Even before the Statute of Frauds,<sup>(a)</sup> a will could not be cancelled without the testator's demonstrating in some way that he intended to revoke it: *Swinburne on Wills* 990. But, with regard to wills made after the Statute of Frauds, it is clear that a man cannot revoke his will even by manifesting in the strongest way his intention that it shall no longer operate, unless he pursues one of the modes pointed out by the 6th section. There is no pretence for saying that anything of that sort was proved or found here. I give no opinion whether, if the jury had been asked whether or not the tearing off the seal was done by the testator *animo cancellandi*, and they had answered in the affirmative, that would have amounted to a revocation; for, it is manifest that the opinion of the jury never was asked as to whether the mutilation of the document was the act of the testator, or whether he intended to revoke the will. \*Clearly, [\*524 therefore, the cause must go down again. As to the general law upon the subject, *Doe d. Reed v. Harris*, 6 Ad. & E. 209 (E. C. L. R. vol. 83), 1 N. & P. 405 (E. C. L. R. vol. 36), is a very strong case. It was there held, that a will of freehold is not legally revoked, if the testator, intending to destroy it, throws it on the fire, and another person snatches it off, a corner of the envelope only being burnt; even though such person (a devisee under the will) afterwards, being urged by the testator to give up the will, promises to burn it, and pretends to have done so. There was no proof of burning there, and no evi-

(a) The 6th section of the 29 Car. 2, c. 3, enacts that "no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent: but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding."

dence which could supply that deficiency. It is impossible here to say that the jury did not understand that they might find for the plaintiff either if they found the second instrument inoperative as a will or that the testator had given it to his natural son for the purpose of destroying it, which he had neglected to do. If so, it is manifest that the verdict must have proceeded upon a ground which is not sustainable in law.

WILLES, J.—I am of the same opinion. It is impossible to say whether the jury came to the conclusion that the document in question was not a genuine will, or that it was once a genuine will but the testator intended to abandon it. It is obvious from the summing up, that the jury, if they took the law from the Lord Chief Baron, must have been of opinion that it was enough for them to come to the conclusion that it ceased to be a will if the testator gave it to his son in order that he might destroy it, even though the testator never did any act which amounted to a destruction or cancellation of it. It is clear, that, to prevent an instrument having effect as a will, there must be some act done beyond the mere delivering it to a third person to be destroyed. The acts which will amount to a cancellation of a will are \*525] enumerated in 1 Williams's Executors, pp. 113—116. At the latter page it is said, that, "With respect to what shall amount to an act of destruction, if done before Jan. 1, 1838, sufficient to operate as a total revocation,—If the testator has torn off or effaced his seal and signature at the end of a will, the Court will infer an intention to revoke the whole will, this being, until the passing of the new statute,(a) the ordinary mode of performing that operation: *Scruby v. Fordham*, 1 Add. 78. Again; where lines were drawn over the name of the testator, this was held to amount to a revocation by cancellation: *Slade v. Friend*, cited by Sir George Lee, 1 Cas. temp. Lee 451. So, tearing off the seal only of a will, where the attestation clause declares it was signed and sealed, has been held a cancellation: *Lumbell v. Lumbell*, 3 Hagg. 568; *Davies v. Davies*, 1 Cas. temp. Lee 444. And the principle appears to have been established, that, if the intention to revoke was apparent, an act of destruction or cancellation should carry such intention into effect, although not literally an effectual destruction or cancellation, provided the testator had completed all he designed to do for that purpose: *Moore v. Moore*, 1 Phillim. 406." I will only add that there was in my opinion abundant evidence of destruction by one of those means to warrant the jury in finding from that which was patent on the face of the will, that the testator had reduced it to the state in which it was with an intention to cancel it. There has, however, been no verdict upon that. It is quite consistent that the jury may have come to a conclusion against the will although they thought it a genuine instrument.

BYLES, J.—I am of the same opinion: and I have nothing to add \*526] except that, upon a matter of such vast importance to the validity of wills, we ought to be very careful not to let any question go to the jury but such as the common or the statute law intended should go to them. Rule absolute.

The second trial took place before Willes, J., at the Lincoln Spring Assizes, 1862, when it was objected on the part of the plaintiff that

the will of 1788 was not admissible, inasmuch as it did not come from the proper custody. It was further objected, that, if admissible, strict proof ought to be given of its due execution, in consequence of the suspicious appearance it presented (the paper over the wafer which formed the seal having been torn off), and of its having been kept so long concealed.

On the part of the defendant, evidence was given of the death of all the witnesses to the second will, and of the handwriting of one of them, Cousins: and it was insisted that the document was admissible as being more than thirty years old, and as coming from a custody which was reasonable. The housekeeper of James Legard, the tenant for life, also proved that he had, a short time before his death, got a person to read it, in order to ascertain whether or not he could dispose of the property by will.

The learned Judge ruled that the will was admissible; and he left it to the jury to say whether they would infer from all the circumstances that the will was mutilated by the testator *animo revocandi*, or the paper torn off the wafer by accident.

\*The jury found that it was a genuine will, and that the mutilation might have occurred by accident. A verdict was [\*527 thereupon entered for the defendant.

*Hayes*, Serjt., in Easter Term, obtained a rule nisi to enter a verdict for the plaintiff, pursuant to leave reserved, on the ground that the will of 1788 was not admissible in evidence.

*Macaulay*, Q. C., and *Field* showed cause.—The will of 1788 was admissible on two grounds,—first, because it was proved according to the ordinary mode of proof, viz., by showing the deaths of the three attesting witnesses, and proving the handwriting of one of them,—secondly, because it came from a place of custody where it might reasonably be expected to be found. [WILLIAMS, J.—I always thought it was well settled, that, where all the witnesses are dead, it is enough to prove the handwriting of one of them.] In *Adam v. Kerr*, 1 Bos. & P. 360, Buller, J., says: "Where a witness is dead, the course is, to prove his handwriting. In this case, one of the attesting witnesses was dead, and the other was beyond the reach of the process of the Court: the best evidence, therefore, which could be obtained was given. The handwriting of the obligor need not be proved: that of the attesting witness, when proved, is evidence of everything on the face of the paper, which imports to be sealed by the party." [BYLES, J.—In the case of an issue out of Chancery, it is usual to call all the attesting witnesses.] Subject, of course, to the other rule, as to proof of handwriting, where all are dead: *Roscoe's Evidence*, 10th edit. 125; *Taylor on Evidence*, 3d edit. Vol. I., p. 356, Vol. II., p. 1472; *Williams on Executors*, 5th edit. 87. Upon every principle of reason and good sense, where proof is given of the handwriting of one of the attesting witnesses, and satisfactory evidence of the death of the \*other two, that ought to be sufficient to cast the burthen of [\*528 proof on the other side. Then, as to the place from which the will was produced,—it was found in a box with other deeds and documents belonging to the tenant for life. Why was that not the proper custody? There is nothing in the rule laid down by the Judges in the case of *The Bishop of Meath v. The Marquis of Winchester*, 4

Clark & Fin. 445, 539, 3 N. C. 183, 200 (E. C. L. R. vol. 32), 3 Scott 561, 578 (E. C. L. R. vol. 36), to show that it is otherwise than a proper place of custody. In Roscoe on Evidence, 10th edit. 112, the rule deduced from all the authorities is thus stated,—“The ‘proper custody’ means that in which the document may be reasonably expected to be found, although in strictness it ought to be in another place.” [WILLES, J., referred to the note to Lord Buckhurst’s Case, 1 Rep. 1, 6, where a great number of authorities on the subject are collected.] In Doe d. Jacobs v. Phillips, 8 Q. B. 158, a deed more than thirty years old, creating a term to attend the inheritance, was produced from the custody of the plaintiff’s attorney. The plaintiff was administrator to the trustee of the term. There was evidence that the attorney had acted for the family of the defendants, who were beneficially interested in the premises to which the deed related; and it was not shown for whom the attorney held the deeds: but the Court held that there was sufficient *prima facie* evidence of proper custody. Coleridge, J., there says: “Evidence of the custody from which a deed thirty years old comes, is given, not as a ground for reading the instrument for or against a party, but only to afford the Judge reasonable assurance of its authenticity.”

*Hayes, Serjt., and Beasley*, in support of the rule.—It was incumbent on the defendant, before the will in question could properly be admitted, \*529] to show that the \*requisites of the Statute of Frauds had been complied with. If one of the attesting witnesses had been called, and he had proved the attestation by himself and the other two, that, no doubt, would have been sufficient. There is, however, no authority for saying that evidence enough was offered here. It was not the *best* evidence: proof of the handwriting of the three witnesses would have been better. If such evidence as this be held enough after seventy years, why should it not equally suffice at the end of three years or five years? As it now stands, the evidence is, that the will was attested by *one* witness. No case has been cited to warrant this. A will is not like a bond or a deed: in the case of the latter, no attesting witness is required, unless it be a deed executed in pursuance of a power; and, in the case of a bond, there is usually but one witness. The other objection is equally unanswered. The question was, whether, under the peculiar circumstances of this case, there is a presumption of the authenticity of this will. In the cases referred to, there was but one will. Here, there is another, which comes from the proper custody, viz., the spiritual Court, and which has been acted upon for seventy years: and the question is, whether that is to be displaced by the superior presumption in favour of a will which is produced from an inferior custody. If the second will was a genuine and uncancelled instrument, why was it not proved? Suppose the seal had been torn off *animo revocandi*, that, clearly, would have been a revocation as to realty as well as personalty. [WILLIAMS, J.—The jury would not hear of that.] It was not a question for the jury. If there be any erasure or blot, it is incumbent on the party relying upon the instrument to explain the ambiguity before it goes to the jury. This document was proved to have been kept in a box with \*530] the probate of the \*first will. What possible presumption can there be in favour of the genuineness of the second will over

that which was proved and acted upon,—more especially as James Legard, the tenant for life, took a larger interest under the concealed will, and also was the executor named in it, and therefore had a duty to prove it? In Buller's Nisi Prius 255, it is said: "If the deed be thirty years old, it may be given in evidence without any proof of the execution of it; however, there ought to be some account given of the deed, where found, &c. And, if there be any blemish in the deed by rasure or interlineation, the deed ought to be proved, though it were above thirty years old, by the witnesses, if living, and, if they be dead, by proving the hand of the witnesses, or at least one of them, *and also the hand of the party*, in order to encounter the presumption arising from the blemishes in the deed; and this ought more especially to be done, if the deed import a fraud; as, where a man conveys a reversion to one, and after conveys it to another, and the second purchaser proves his title; because in such case the presumption arising from the antiquity of the deed is destroyed by an opposite presumption; for, no man shall be supposed guilty of so manifest a fraud: Chettle v. Pound, Hereford Assize, 1701: Gilb. Evid. 103." [WILLIAMS, J., referred to Evans v. Rees, 10 Ad. & E. 151 (E. C. L. R. vol. 37), 2 P. & D. 626.] The ordinary mode of cancellation of a sealed instrument, is, by obliterating or destroying the seal. [WILLIAMS, J.—The place of custody was equally proper, if the seal had been partially destroyed *animo revocandi*. In Phillipps on Evidence, 10th edit., Vol. II., p. 245, it is said: "It is a rule, that, if an instrument is thirty years old, it may be admitted in evidence without any proof of its execution: such instrument is said to prove itself. This rule appears to be founded on the general experience of the \*inconvenience and [\*531 inutility of searches after attesting witnesses to ancient deeds, and on the expediency of fixing some definite limit to searches of this nature. The danger arising from such a relaxation of general principles is, in some measure, diminished by the operation of the rule which requires documents to be produced from their proper place of custody, or at least from a place of deposit which, if not the one which would be strictly required by law, would be one where, in the ordinary course of things, the document, if genuine, might reasonably be expected to be found; and, in many instances, the circumstances of the instrument having been acted upon, and of the enjoyment of property being consistent with and referable to it, or otherwise, afford a criterion of its genuineness. The exception above mentioned applies not only to such instruments as are generally of a formal character, such as wills, bonds, and other deeds, but also to receipts, letters, entries, and all other ancient writings: and the execution or writing of them needs not be proved, provided they have been so acted upon, or brought from such a place as to afford 'a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty.' If there is any blemish in the deed, by rasure or interlineation, the deed ought to be proved, though above thirty years old, and the blemish satisfactorily explained." The whole conduct of the party here agrees with the appearance of the document. If he had not known that the testator had intended to revoke it, he would no doubt have proved it. In Bibb d. Mole v. Thomas, 2 Sir W. Bl. 1048, it was held that a slight

tearing of a will, and throwing it on a fire, with a deliberate intent to consume it, by the testator, though it falls off and is preserved by a \*532] bystander, without his consent or knowledge, is a \*sufficient revocation. [WILLIAMS, J., referred to Price v. Powell, 3 Hurlst. & N. 341.† There, a person having made his will, executed under seal, and published and attested as a sealed instrument, afterwards, for the purpose of revoking it, tore off the seal, and with it part of a word: and it was held that the act of tearing off the seal was sufficient, within the 20th section of the 7 W. 4 & 1 Vict. c. 26, and that the will was thereby revoked.] *Cur. adv. vult.*

WILLIAMS, J., now delivered the judgment of the Court:—

This rule was obtained on the ground that the will ought not to have been admitted to be put in evidence at the trial, because it was not produced from the proper custody.

Two answers were put forward on showing cause,—first, that it was not necessary to resort to the rule that an instrument above thirty years old is admissible without proof of its execution, if produced from the proper custody, because the will was sufficiently proved by giving evidence of the death of all the witnesses to the will and the handwriting of one of them,—secondly, that the will was produced from the proper custody.

As to the former answer, it is unnecessary to give any opinion; because we think the latter is sufficient. But I must say for myself, that, although no authority was cited before us, and I have not been able to find any in support of it, my impression, founded, I believe, on the practice of the Oxford circuit, has long been, that, where, as in the present case, the attestation clause recites a compliance with the requisite ceremonies in respect of all the witnesses, it is enough, in order to make a *prima facie* case, to prove the death of all and the \*533] handwriting of one of them; because it \*will be presumed that everything he thus declared by his attestation to have been done was really done.

But, at all events, in this case, we are of opinion that this will was produced from the proper custody, and consequently the rule must be discharged. The will was proved to have been in the keeping of the person entitled under it to the estate in question as tenant for life, and he was shown to have treated it as his title-deed, and, shortly before his death, to have desired that some competent person might read it over, in order to see whether he was empowered by it to dispose of the property by his will.

This would surely have been sufficient proof that the will came from proper custody, if nothing else had appeared in the case. Indeed, it is difficult, if not impossible, to suggest any more proper custody, unless that of the Ecclesiastical Court. But it is obvious, that, if it were to be held that the will was not admissible, because not produced from the Ecclesiastical Court, it would be tantamount to holding that the rule shall never apply to a will of land which also disposes of personalty, unless it has been admitted to probate,—a proposition which no one has contended for. It was argued, however, on behalf of the defendant, that the will was not admissible, because the appearance of it leads to a suspicion that it was cancelled after it was duly executed. But, how does this bear on the question whether the will

was found in the custody where it might naturally be expected to be found if it had been duly executed? The custody is equally so, it should seem, whether the will were cancelled or uncanceled: see the opinion of the Judges in *Lord Trimlestown v. Kemmis*, 9 Clark & Fin. 749.

The rule that an instrument more than thirty years old shall be presumed to have been duly executed if it purports so to have been, is founded on the great difficulty that must arise in some cases, and the \*impossibility in many others, after the lapse of time, of proving the handwriting of parties making the instrument or attesting it. Therefore it is that due execution is to be presumed, provided the instrument is produced from such a custody as might naturally be expected. It seems to us that the application of this rule cannot be affected by a surmise that the instrument was cancelled after it was duly executed. [\*534]

Two questions still remained for the jury. Notwithstanding the will was produced from the proper custody, and purported to have been duly executed, and was more than thirty years old, these circumstances are not conclusive, and the jury might still negative its being a genuine will, or its having been properly executed. And the jury might still, if they thought right, come to the conclusion that the paper was mutilated *animo revocandi*.

But the jury were of opinion that the will was a genuine duly-executed will, and further found that the tearing off the paper from the wafer was accidental, and not done by the testator *animo revocandi*.

As I was not in Court when this rule was moved for, I think it right to take this opportunity of saying that I do not think the jury were wrong. I find no reason to doubt that the will was genuine and duly executed; and I think the appearance of the instrument does not justify the suggestion that it was cancelled by the testator.

The real history of the case perhaps is, that the testator desired some one to destroy the will, who neglected to do so; in which case the will was never legally revoked, by reason of the enactment of the Statute of Frauds, though the parties interested may have so regarded it. And, if it was a genuine will, and never revoked, it becomes impossible legally to refuse to allow it to operate.

Rule discharged.

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**\*PEDDER v. THE MAYOR, ALDERMEN, AND BUR- [535  
GESSES OF PRESTON. June 2.**

The corporation of P. (who besides their municipal character filled those of managers of the public baths and washhouses under the Baths and Washhouses Act, 1846, and of the local board of health under the Public Health Act, 1848), kept three separate accounts at their banker's, viz.: 1. "The Corporation of P. Account," 2. "The Corporation Baths and Washhouses Revenue Account," 3. "The P. Local Board of Health Account." Upon the first account they were indebted to the bank, and upon the two other the bank was indebted to them in an equal amount. In an action brought by the banker to recover the balance due to him on account No. 1,—Held, that the corporation were entitled to set off the debts due to them on the other two accounts.

THIS action was brought to recover the sum of 4996*l.* 16*s.* 1*d.*,

claimed by the plaintiff; and the following case was stated by consent, without pleadings:—

From the 1st of January, 1854, until the death of Edward Pedder, the said Edward Pedder and the plaintiff carried on business together as bankers in copartnership at Preston, in the county of Lancaster, under the name, style, and firm of Pedder & Co.

Edward Pedder died on the 1st of March, 1861; and the plaintiff continued to carry on the said business until the 10th of April following, when he suspended payment, and presented a petition to the Court of Bankruptcy for the Manchester district, under the clauses of the Bankrupt Law Consolidation Act, 1849, relating to arrangements between debtors and their creditors under the superintendence and control of the Court.

Meetings were held under the said petition, and a proposal and amended proposal was on the 28th of June, 1861, approved and confirmed by the Court; and in pursuance thereof a deed was prepared and executed by the plaintiff and by the great body of the creditors, whereby provision was made for applying the assets of the plaintiff, under the inspection of certain inspectors appointed by and made parties to the said deed, in satisfying the claims of creditors in manner therein mentioned; and by the said deed the estate was, subject to the provisions thereof, to be administered as in bankruptcy.

\*536] Many years ago, and before either Edward Pedder or the plaintiff were partners in the bank, and whilst the business of the said bank was being carried on by the predecessors in business of the plaintiff and Edward Pedder, a banking account was opened by the said mayor, aldermen, and burgesses with the said then banking firm, which account was continued with the said bank until the formation of the said firm of Pedder & Co., and was then continued with the said firm until the death of the said Edward Pedder, and afterwards with the plaintiff until his said suspension. This account was headed, "Corporation of Preston," in the books of the bank, and in the pass-book in which from time to time a copy of the said banking account was written up, and which pass-book was from time to time delivered by the bank to Mr. Philip Park, who filled the office of treasurer and steward of the said mayor, aldermen, and burgesses.

The corporation of Preston, after the passing of the Baths and Washhouses Act, 1846, 9 & 10 Vict. c. 74, and for the purpose of performing their duties arising from the adoption of the said Act, kept another account with Messrs. Pedder & Co., which was headed "Corporation Baths and Washhouses Revenue Account" in the books of the bank, and in the pass-book in which from time to time a copy of the said banking account written up, and which pass-book was from time to time delivered to the said Philip Park. The said treasurer from time to time made payments to the bank to the credit of the said Corporation of Preston account, such payments being of moneys levied as watch-rates in the township of Preston and of rents of land, market-tolls, and other income derived from property of the said mayor, aldermen, and burgesses; and checks were from time to time drawn on behalf of the said mayor, aldermen, and burgesses upon the said \*537] account, and \*paid by the bank. Such checks were drawn by the said treasurer of the said mayor, aldermen, and burgesses,

or by Messrs. Park, Son & Garlick, the firm of surveyors of which the said treasurer was a partner, and were exclusively in respect of salaries to officers of the said mayor, aldermen, and burgesses, payments to the police force, and other liabilities of the said mayor, aldermen, and burgesses. The said treasurer from time to time also made payments to the bank to the credit of the baths and washhouses account, such payments being of moneys levied as a baths and washhouses rate in the townships of Preston and Fisherwick, which together comprise the whole of the said borough; and checks were from time to time drawn on behalf of the said mayor, aldermen, and burgesses upon the said baths and washhouses account, and paid by the bank.

The said Corporation of Preston accounts were balanced half-yearly in the books of the said bank and pass-books. No entries were made to the credit or debit of the said accounts in respect of payments to the bank by or on behalf of the said Local Board of Health hereinafter mentioned, or in respect of payments to the said Local Board of Health or their order. The balances of the said Corporation of Preston accounts were at times in favour of the bank, when the balances of the accounts of the Local Board of Health hereinafter mentioned, or one of them, were against the bank; and the balance of the said Corporation of Preston account was at other times against the bank, when the balances of the said accounts of the Local Board of Health, or one of them, were in favour of the bank. Interest was allowed to or by the bank, and introduced into the said Corporation of Preston account, on the balances from time to time, without regard to the state of the other accounts, \*hereinafter mentioned. A higher rate of interest was taken by the bank from their customers whose accounts were in favour of the bank than was allowed to customers on balances in their favour. [\*538]

The following are specimens of the forms of the checks so drawn on the bank in respect of the said Corporation of Preston accounts:—

"No. —

"March 28, 1861.

"Preston Old Bank.

Established in 1776.

"Messrs. Pedder & Co. Pay to Joseph Gibbons, or bearer, forty-eight pounds, nine shillings, and eleven pence, on account of the Corporation of Preston.

"£48 9s. 11d."

"PARK, SON & GARLICK."

"No. —

"November 9, 1860.

"Preston Old Bank.

Established in 1776.

"Messrs. Pedder & Co. Pay to Messrs. J. A. & J. Blackburn, or bearer, twenty-one pounds, eleven shillings, and three pence, on account of the Corporation of Preston Baths and Washhouses.

"£21 11s. 3d."

"PARK, SON & GARLICK."

At the time of the said suspension of payment, there was a balance on the said Corporation of Preston accounts, other than the Baths and Washhouses account, in favour of the plaintiff, of 5818*l.* 12*s.* 8*d.*

The said mayor, aldermen, and burgesses have since paid to the credit of the said Corporation of Preston account the sum of 818*l.* 16*s.* 7*d.*, and the balance after such payment is the said sum of 4996*l.* 16*s.* 1*d.* which is claimed in this action by the plaintiff, with the assent and

by the direction of his said inspectors. There was also a balance in favour of the plaintiff on the baths and washhouses account of 2011. 16s. 8d., which balance has been paid by the mayor, aldermen, and burgesses to the plaintiff.

The Public Health Act, 1848 (11 & 12 Vict. c. 63), was by a provisional order in council, confirmed by the \*13 & 14 Vict. c. \*539] 90, put in force in the borough of Preston; the district of the said borough and the district of the Local Board of Health under the said Public Health Act being co-extensive.

The district is exclusively composed of two townships; the township of Preston and the township of Fisherwick forming together the borough of Preston.

By the Public Health Act, 1848, s. 12, it is enacted, that, in every district exclusively consisting of the whole or part of any corporate borough, the mayor, aldermen, and burgesses of such borough shall be, by the council of the borough within and for such district, the Local Board of Health under that Act: and such council shall exercise and execute the powers, authorities, and duties of such Local Board of Health, according to the law for the time being in force in respect to municipal corporations in England and Wales.

By the Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 24, it is provided that the duty of carrying this Act into execution shall be vested in a local board, and such local board shall be, in corporate boroughs, the mayor, aldermen, and burgesses, acting by the council.

The council of the said borough has continued to perform the powers and duties vested in it by the said Public Health Act, 1848, and the Local Government Act, 1858, and other Acts amending the same. The said Local Board of Health have under the powers of the said Acts, in execution of their duties connected with drainage, sewerage, and other matters, from time to time made and collected general rates extending over the whole of their district, and also special rates extending over portions only of their district.

The Local Board of Health some time before the 2d of March, 1854, opened two banking accounts with the said bank; one of the \*540] accounts being called in the \*books of the bank and the pass-books "The General District-Rate Account," and the other "The Special District-Rate Account." The said two accounts related to rates levied by the said Local Board of Health. On the 2d of March, 1854, the said two accounts were closed, and the balances of the same were carried to a new account then opened by the Local Board of Health with the said Bank, called "The Preston Local Board of Health Account," and which account, from the month of July, 1855, to the time of the plaintiff's suspension of payment, was headed in the books of the bank and in the pass-book containing a copy of such account, and which pass-book was from time to time delivered to an officer of the Local Board of Health, as follows:—"The Preston Local Board of Health in account with the Preston Old Bank."

Payments were from time to time made on behalf of the Local Board of Health to the bank to the credit of this account, consisting of amounts received for rates levied by the said Local Board of Health as aforesaid, and not being water-rates, and of other funds belonging to the said Local Board of Health, and acquired by them in pursuance

of the provisions of the said Acts; and payments were from time to time made by the bank, and charged to the debit of this account, on account of expenses and liabilities incurred by the said Local Board of Health in execution of the powers and duties of the said Acts.

Such payments by the bank were made on checks signed on behalf of the said Local Board of Health by the engineer of the said board and two members of the council.

Such checks were of colour different from that of the checks drawn on the said Corporation of Preston accounts as above mentioned, and also from that of the checks on the "Local Board of Health Water Account," hereinafter mentioned.

\*The following is a specimen of the form of the checks so drawn on the said bank on behalf of the said Local Board of Health on general account:—

"No. 585.

"Preston Old Bank.

"March 28, 1861.

Established in 1776.

General Account.

"Messrs. Pedder & Co. Pay to Mr. Richard Hoyle, or order, the sum of one hundred and twenty-one pounds, seven shillings, and five pence, for the Local Board of Health.

"JOHN NEWTON, Engineer.

"ROBERT BENSON, Jun. } Members of

"JOHN GUDGEON, } council."

"£121 7s. 5d."

At the time of the said suspension of payment, there was a balance in favour of and due to the said Local Board of Health on the said general account, of 1719*l.* 5*s.* 6*d.*

In the year 1853, the Preston Waterworks Act, 1853 (16 & 17 Vict. c. xlviii.), was passed; and the Local Board of Health acquired the waterworks therein mentioned under the powers thereby conferred.

In pursuance of the provisions of that Act, the said Local Board of Health levied water-rates over the whole of the said borough, and under s. 34 of the same Act kept in their books a separate and distinct Water Account; and an account was kept with the said bank from the year 1854 to the time of the plaintiff's suspension of payment; and from the year 1855 to the time of the said suspension was headed in the books of the said bank, and in the pass-book containing a copy of such account, and which pass-book was from time to time delivered to the Local Board of Health, as follows,—“The Preston Local Board of Health in account with the Preston Old Bank.”

\*Payments were from time to time made on behalf of the Local Board of Health to the bank, to the credit of the said "Local Board of Health Water Account," and payments were from time to time made by the bank on checks drawn upon and debited to the said water account. Such checks were drawn in respect of liabilities of the said Local Board of Health incurred in connection with the making and maintaining of the said waterworks and the supply of water to their district. The checks upon which such payments were made were signed on behalf of the Local Board of Health by the engineer of the said board and two members of the council.

The following is a specimen of the form of checks so drawn on the said bank on behalf of the said Local Board of Health on water account:—

"No. 497.

"Preston Old Bank.

"March 28, 1861.

Established in 1776.

"Messrs. Pedder & Co. Pay to Mr. Richard Hoyle, or order, the sum of twenty-five pounds, thirteen shillings, and six pence, for the Local Board of Health.

"JOHN NEWTON, Engineer.

"ROBERT BENSON, Jun. } Members of  
"JOHN GUDGEON, } council."

"£25 13s. 6d."

At the time of the said suspension of payment, there was a balance in favour of and due to the said Local Board of Health on the said water account, of 3277l. 10s. 7d.

The said "General Account" and "Water Account" were respectively balanced half-yearly in the books of the bank, and in the pass-books; but, for the purpose of ascertaining whether any and what interest was to be allowed by or to the bank, the said Local Board of Health "General Account" and "Local Board of Health \*Water \*543] Account" were treated as one account. The mayor, aldermen, and burgesses did not draw upon or make payments to the credit of the said "Local Board of Health General Account" and "Local Board of Health Water Account," or either of them, or in any way exercise control over either of the same.

The meetings of the council are called by one notice signed by the Mayor, and by one summons from the town-clerk.

The summonses are signed in the following form:—"Robert Ascroft, town-clerk, and clerk to the Local Board of Health," and specify all the business proposed to be transacted at the meeting, whether relating to corporation or Local Board of Health business, but distinguishing the one business from the other.

At the council meetings so called, the business both of the corporation and Local Board of Health is transacted in the order mentioned in such summonses.

The minutes and accounts of the corporation are kept in separate books from those of the Local Board of Health. The minute-books in each case are headed as follows:—

"Borough of Preston, in the county of Lancaster.

"At a meeting of the Council of the said borough, held," &c.

And in each case the proceedings are signed by the mayor, and published in one book.

One finance committee is appointed on the 9th of November in each year, which manages the financial matters both of the corporation and the Local Board of Health; and their proceedings are entered in one book.

The accounts of the mayor, aldermen, and burgesses are audited by a person appointed by the mayor as auditor, under the 5 & 6 W. 4. \*544] c. 76, s. 93, and by two \*persons elected auditors under s. 37 of the same statute, and, on being audited, are signed as follows:—

"ROBERT PARKER, }  
"HENRY JENNINGS, } Auditors."  
"J. F. HIGGINS, }

The accounts of the Local Board of Health are audited under the Public Health Act, 1848, s. 122, and the Local Government Act, 1848,

s. 60, and are audited by the same three auditors, and, on being audited, are signed by such three auditors.

The said Local Board of Health have, under the powers of the said Public Health Act, 1848, and Local Government Act, 1858, borrowed for the purposes of main drainage within the said township of Preston large sums upon mortgage of the special district-rates of the said township, and which sums are still due. The said Local Board of Health have also, under the powers of the said last-mentioned Acts and the said Preston Waterworks Act, 1853, borrowed large sums on the security of the said rents, rates, and works mentioned in the said last-mentioned Act, and which last-mentioned sums are still due.

The mayor, aldermen, and burgesses are indebted to various creditors, some of them by specialty, some by simple contract; but none of such creditors have any security for their debts over the said general and special district-rates, and water-rents, rates, and works, or any part thereof.

The said mayor, aldermen, and burgesses claim to set off against the said balance of 4996*l.* 16*s.* 1*d.*, which balance is not otherwise disputed by the said mayor, aldermen, and burgesses, the said sums of 1719*l.* 5*s.* 6*d.* and 3277*l.* 19*s.* 7*d.*, the said balances of the said "Local Board of Health General Account," and "Local Board of Health Water Account."

The said Preston Waterworks Act, 1853, accompanied the case, and was to be referred to.

\*It was agreed between the parties, that all amendments, if any, in accordance with the real facts, which the Court might think ought to be made in order to enable them to decide the matters in question between the parties, should be made accordingly; and that the Court should have the power of drawing all inferences of fact which a jury ought properly to draw. [\*545]

The question for the opinion of the Court was, whether the defendants were entitled to set off the said sums sought to be set off, or any part of the same.

*S. Temple*, Q. C. (with whom was *Aspland*), for the plaintiff.—The debt due from the corporation to the plaintiff, and that due from the plaintiff to the corporation, are debts due in *auter droit*, and therefore are not capable of being set off. The rights and duties of the corporation in respect of the raising and the application of the borough-fund are defined by the 5 & 6 W. 4, c. 76, ss. 92, 95. The powers and duties conferred and imposed upon them as managers of the public baths and washhouses under the Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), as the Local Board of Health under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and as proprietors of the Preston waterworks under the Preston Waterworks Act, 1853 (16 Vict. c. xlviii.), are of a character totally distinct from their corporate character, and are to be exercised in a manner altogether different: and the rates and the accounts of each are to be levied and kept separately,—see s. 14 of the Public Baths and Washhouses Act, 1846, ss. 84, 85 of the Public Health Act, 1848, and s. 54 of the Preston Waterworks Act, 1853. In *Gale v. Luttrell*, 1 Y. & J. 180,† A. being indebted to B. in a sum of 1000*l.*, executed a bond to him for securing that amount and interest. B. subsequently died, having

\*546] made his will, and appointed C. and D. his executors \*and residuary legatees. An apportionment of B.'s residuary estate being made, the bond was allotted to C. as part of his share. C., being the steward of A., and having a running account with him, entered the bond in that account. C. died intestate, leaving a widow, who took out administration to his estate, and also administration de bonis non to B.; and, as such last-mentioned administratrix, she filed a bill as a specialty creditor against the representatives of A.: and it was held that in this suit the representatives of A. could not make a set-off against the demand, in respect of sums which they alleged to have been omitted, or improperly charged, in the account of C., but must file a cross-bill,—for that there could be no set-off, either at law or in equity, where either of the debts is a debt in *auter droit*. Could an action brought against the corporation proper be sustained for a debt due from the Local Board of Health in respect of work done or materials supplied to the waterworks? Assuming that these debts are susceptible of set-off at law, it would be manifestly inequitable to permit the funds of the Local Board of Health to be applied in payment of a debt due from the corporation in a totally different character.

*Mellish, Q. C.* (with whom was *Quain*), *contra*.—These are mutual debts at law within the meaning of the statutes of set-off. Although for convenience the accounts are kept separately, the whole substantially forms one fund of the corporation. The rate-payers are the same for all purposes, and the area of rating the same. This is very like the case of a colonel of a regiment keeping two accounts with his agents, one his private account, the other his account as colonel. Could anybody doubt that the balance due to him on the one might \*547] be set off against a claim made \*against him by the agents upon the other? [*BYLES, J.*—Whom do you represent?] The Corporation of Preston and the Local Board of Health. This is not an attempt to misappropriate to the corporation purposes a fund belonging to the Local Board of Health; but to defeat an attempt to apply the fund to the payment of the insolvent's debts. [*WILLIAMS, J.*—The money was handed by the corporation to the banker with directions to him to keep separate accounts.] That does not alter the legal relations of the debtor and creditor. [*WILLIAMS, J.*—Before the statute of set-off, there would have been cross-actions in a case like this. The statute intended to substitute the set-off for a cross-action. Who would have been the party to sue the banker in this case for the balance due on the Local Board of Health account?] The corporation clearly must have sued. *Bodenham v. Hoskins*, 21 Law J., Ch. 864, 16 Jurist 721, was referred to.

*Temple* was heard in reply.

*ERLE, C. J.*—I am of opinion that the defendants in this case are entitled to judgment. The inspectors, in the name of the insolvent, sue the Corporation of Preston for a debt of 4996*l.* 1*s.* 1*d.* Against this demand, the corporation claim to set off a debt of the like amount due to them from the bank. Ordinarily speaking, therefore, this would be a clear and simple case of set-off. The difficulty which is suggested, is, that the corporation fill three separate and distinct characters,—the one, as corporation municipal,—the second, as local

board of health,—the third, as managers of the public baths and wash-houses: and the contention on the part of the plaintiff has been that the corporation municipal is as distinct from the other two bodies as the position and rights of a private individual are separate and distinct from his position \*and his rights when he fills the office of an executor; or, in other words, that the debts are due in different rights, and therefore cannot be the subject of set-off. In point of law, however, it is quite clear that the Corporation of Preston is the party owing the money on the one side, and the party to whom the money is due on the other, and therefore, though the money is due to them upon different accounts, it may be set off. Cases, no doubt, may be put where it would be improper on the part of the corporation to appropriate the fund belonging to the local board of health to the general purposes of the corporation. But there would be a remedy for that either in a Court of equity, or by objection before the auditors, who probably would disallow such items in the accounts. But it is unnecessary to consider that; for, here the claim of the bank is put forward merely to defeat that of the local board of health, and to put the money into the pockets of the creditors of the bank. I think the defendants are entitled to the set-off at law, and that there is no principle of equity to prevent its being allowed. [\*548]

WILLIAMS, J.—I am of the same opinion. The local board of health is not a corporation, so as to be capable, as such, of being the proprietors of money. The effect of the statute 11 & 12 Vict. c. 63, s. 12, is, to add to the character of the municipal corporation the incidents and duties of the local board of health. The only effect, in point of law, of their opening an account with the bank on behalf of the local board of health, is, that the defendants, in pursuance of their duties as the local board of health, advance money to the bank. The corporation would be the only persons who could sue for the loan; and, instead of being put to bring an action, they are entitled by virtue of the statute of set-off to set the debt so due to them against \*the claim made upon them by the bank. I agree, that, to warrant a set-off, the debts must be mutual, and must be due in the same right. These are mutual debts, and are due in the same right. The money is advanced to and by the corporation as a corporation, and, in suing for it, it would not be necessary for them to declare in any special character. [\*549]

WILLES, J.—I am of the same opinion. I see nothing in any of the provisions of the statutes to which our attention has been called to apply to this case; and I am not disposed to strain their language so as to take this debt out of the ordinary rule as to set-off.

BYLES, J.—As soon as it appeared that Mr. *Mellish* represented the corporation in each of its characters, all pretence for equitable interference was out of the question. That being so, and it being always optional with us, it is plain that no replication on equitable grounds would have been allowed here. The simple question, therefore, is, whether the moneys lent were moneys of the corporation, and the moneys received by them received in their corporate capacity, or whether they were paid and received in *auter droit*. I am not disposed to dissent from the opinion formed by the rest of the Court; and I trust that I am not unduly drawn to that conclusion by its manifest justice.

Judgment for the defendants.

\*550]

\*MILES v. HARRIS. *June 13.*

The sheriff is not entitled to poundage, where, after seizure and before sale, the judgment and all subsequent proceedings are set aside for irregularity.

THIS was an action for sheriff's fees. The declaration contained counts for work done, for money due for poundage on the seizure of goods by the plaintiff at the request of the defendant, for money paid, and for money due on accounts stated.

The defendant pleaded, except as to 1*l.* 1*l.*s., parcel, &c., never indebted, and, as to that sum, payment into Court.

By an order of Keating, J., the question of law raised between the parties was stated in the following case for the opinion of the Court:—

The plaintiff is bailiff of the sheriff of Norfolk, from whom, by post from the London agent of the undersheriff, the plaintiff, on the morning of the 11th of September, 1861, received a warrant in the usual form, by virtue of a writ of *fi. fa.*, commanding the plaintiff, as such bailiff of the goods and chattels of Alfred Oldfield Gathergood within the said sheriff's bailiwick, that he should cause to be made 107*l.* 9*s.* 5*d.*, together with interest upon the said sum, at the rate of 4*l.* per cent. per annum, from the 30th of August, 1861; so that the said sheriff might have that money, with such interest as aforesaid, before the Barons of the Exchequer of Pleas of the Queen at Westminster, immediately after the execution thereof, to render to Henry Solomon, in the said writ named, for the sum recovered and interest in the said writ mentioned.

In the margin of the warrant the endorsement on the writ of *fi. fa.* was set forth, and such endorsement was in the words and figures following, that is to say,—“Levy 107*l.* 9*s.* 5*d.*, and 1*l.* 6*s.* for costs of \*551] \*execution, and also interest on 107*l.* 9*s.* 5*d.*, at 4*l.* per cent. per annum, from the 30th of August, 1861, until payment; besides sheriff's poundage, officer's fee, costs of levying, and all other legal incidental expenses. This writ is issued by Henry Harris, of No. 34A Moorgate Street, in the city of London, attorney for the said Henry Solomon. The defendant is an auctioneer, and resides at Lynn, in your bailiwick.”

In obedience to the said warrant, the plaintiff entered certain premises of the said Alfred Oldfield Gathergood, at King's Lynn, in the county of Norfolk, being within the bailiwick of the sheriff, and there seized goods of the said Alfred Oldfield Gathergood sufficient to make the said sum recovered, interest, and expenses. The plaintiff remained two days in possession, and then the judgment was found to be, and had in fact been, irregularly signed; and it and all subsequent proceedings having been after the seizure aforesaid set aside for irregularity, the plaintiff withdrew from possession by order of the (now) defendant, who was the attorney who sued out the writ and caused the said warrant to be issued.

Afterwards, the plaintiff sent his account to the defendant, demanding the sum of 6*l.* 15*s.* 3*d.*, as follows:—

"Sheriff's poundage on levy for 108 <i>l.</i> 15 <i>s.</i> 5 <i>d.</i> . . . . .	5	4	8
"Executing warrant . . . . .	1	1	0
"Two days' possession . . . . .	0	10	0
	<hr/>		
	£6	15	3"

The amount was not paid, and thereupon this action was brought.

The defendant does not dispute the last two items, and has in fact paid into Court 1*l.* 11*s.* in respect \*of them, under the appropriate plea; but he denies his liability, under the circumstances [\*552 above stated, to pay sheriff's poundage, and puts such liability in issue by the plea of never indebted except, &c.

The question for the opinion of the Court was, whether, under the circumstances, the plaintiff was entitled to recover from the defendant sheriff's poundage.

If that question should be answered in the affirmative, judgment was to be entered for the plaintiff on the first issue, for the sum of 5*l.* 4*s.* 3*d.* If the question should be answered in the negative, judgment was to be entered on the first issue for the defendant.

*David Keane*, for the plaintiff.—The 29 Eliz. c. 4, s. 1, entitles the sheriff to a poundage of 6*d.* for every 20*s.* over 100*l.* which he shall "levy or extend and deliver in execution." The question is, whether that which was done here amounts to a levying and delivering in execution. The goods were seized, and, without any default on the part of the sheriff, his hand was stayed before a sale had taken place. It is submitted, that, so far as the rights of the sheriff are concerned that which was done was equivalent to a levying and delivering in execution, within the fair meaning of the statute. In *Watson on Sheriffs*, 2d edit. 109, reference is made to *Anonymous*, Loft 253, where it is said that "a sheriff shall not be entitled to poundage if judgment is irregular." The learned author upon this observes,—“This dictum, however, in its generality, seems equally opposed to justice and to later authorities:” and he refers to *Bullen v. Ansley*, 6 Esp. N. P. 111, and *Rawstone v. Wilkinson*, 4 M. & W. 256.† In *Bullen v. Ansley*, after a levy of the amount under a fi. fa., the execution [judgment?] was set aside for irregularity, and the money levied ordered to be restored: and in an action \*brought by the judgment-creditor [\*553 against the sheriffs to recover a sum retained by them for poundage, Lord Ellenborough said “that the plaintiff had no title to recover; that the sheriffs, having regularly levied under the authority of the writ of execution, had nothing to do with the regularity or irregularity of the proceeding under which that writ had issued; that was the act of the party himself by whom it was sued out: the authority of the writ the sheriffs could not question, but were bound to obey: they had, therefore, paid proper obedience to the writ, and the statute having given them certain fees for their trouble as poundage, they were legally entitled to those fees on account of their levy.” So, in *Rawstone v. Wilkinson*, where the sheriff levied under a fi. fa., and received the money, and afterwards, the judgment and execution being set aside for irregularity, and the money ordered to be returned, paid it back with the assent of the plaintiff,—it was held that the statute 43 G. 3, c. 46, s. 5, did not take away his remedy by

action of debt against the plaintiff for his poundage.<sup>(a)</sup> The Court there say: "The execution being irregular was owing to the fault of the defendants and not of the sheriff, and therefore he shall not be deprived of his poundage on that account. And the 43 G. 3, c. 46, does not vary his rights." *Earle v. Plummer*, 1 Salk. 332, is an authority to the same effect. Again, in *Alchin v. Wells*, 5 T. R. 470, it was held, that, if a sheriff levy under a fi. fa., he is entitled to poundage, \*554] \*though the parties compromise before he sells any of the defendant's goods. [WILLES, J.—Can the *bailiff* maintain an action on the statute of Elizabeth for the poundage?] Bailiffs are expressly mentioned in the statute.

*Joyce*, for the defendant.—1. The sheriff's right to poundage arises only when he has levied and delivered the money in execution; or, possibly, where he has been by the act or default of the execution-creditor prevented from so doing. In all the cases which have been cited, the money was actually obtained by and under the pressure of the writ, or there was a compromise. But here, in consequence of the irregularity, the whole proceedings became abortive before the levy was consummated. In *Colls v. Coates*, 11 Ad. & E. 826 (E. C. L. R. vol. 39), 3 P. & D. 511, it was held that the sheriff is not entitled to poundage on a fi. fa. unless there has been a levy; and therefore, where, after the sheriff had received the writ, but before execution, the defendant, to stop execution, offered the sheriff to pay the money for which the writ issued, and the sheriff refused to receive it without poundage, which the defendant paid under protest,—the Court of Queen's Bench, on motion, ordered the sheriff to refund the poundage. Lord Denman there says: "As the sheriff has not levied or collected, he has no claim for poundage." And Coleridge, J., says: "The right of the sheriff arises from his executing: there is no execution where there is no levy. In *Graham v. Grill*, 2 M. & Selw. 294, the sheriff had seized property under a *capias utlagatum*, and taken an inquisition thereon: the outlawry was reversed before there had been any venditioni exponas; and the sheriff was not allowed poundage. There Lord Ellenborough said,—'Is there not this difficulty here, that there has been no levy of the money? and, therefore, supposing a *capias utlagatum* \*555] \*to come within the words *extent or execution* in the statute of Elizabeth, must not the money be levied in order to entitle the sheriff? The right of the sheriff to poundage is a right merely *positivi juris*, and, unless expressly conferred by the Act of Parliament, he cannot claim it.'" The direction to the sheriff is, that he cause *to be made* the debt, &c. The poundage attaches to the amount the sheriff makes. The money was no more made here than it was in *Colls v. Coates*. The language of the sheriff's return of *feri feci* shows the meaning of the word *levy*.<sup>(b)</sup> [ERLE, C. J.—What are the words of the Bankrupt Act as to the levying of executions?] The words of

(a) The 43 G. 3, c. 46, s. 5, enacts, "that, from and after the 1st of June, 1803, in every action in which the plaintiff or plaintiffs shall be entitled to levy under an action against the goods of any defendant, such plaintiff or plaintiffs may also levy the poundage, fees, and expenses of the execution over and above the sum recovered by the judgment."

(b) "By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within-named C. D. the moneys and interest within mentioned, which I have ready before her Majesty, &c., at the day and place within mentioned, to be rendered to the said A. B., as I am within commanded:" Chitty's Forms, 9th edit. 324.

the 133d section of the 12 & 13 Vict. c. 106, are, "all executions and attachments against the goods and chattels of any bankrupt *bonâ fide executed and levied by seizure and sale* before the date of the fiat or the filing of such petition, shall be valid," &c. [BYLES, J.—In *Rex v. Robinson*, 2 C. M. & R. 334,† 5 Tyrwh. 1095, 4 Dowl. P. C. 447, under a writ of extent for penalties under the excise laws, the sheriff levied goods of the defendant of the value of 824*l.*: a negotiation took place; the sheriff remained in possession; and ultimately the Crown accepted 500*l.* in satisfaction of the penalties, which amounted to 1000*l.*: and it was held that the sheriff was entitled to poundage only on 500*l.*] That is an extremely strong case. Parke, B., says: "The authorities cited go thus far,—that the sheriff is entitled to poundage on all the amount obtained under the compulsion of the process: but there is no case which \*goes to the extent of saying, that, with respect [\*556 to Crown process, poundage is to be paid on more than came to the hands of the Crown by means of the process; and the only case on civil process which seems to bear that construction is that of *Alchin v. Wells*, 5 T. R. 470: but, when it is looked at more precisely, it certainly does not go to the extent Mr. Jervis contends for: all that the Court decided, was, that, after such a compromise as took place in that case, they would not allow the private arrangement of the parties to defeat the sheriff of his poundage. There is no other case even apparently deciding that he is entitled to poundage on a greater amount than is actually obtained under the compulsion of the writ." The mere seizure amounts to nothing.(a) 2. There is no authority for holding that the *bailiff* can sue for the sheriff's poundage. [WILLIAMS, J.—What do you say to the case of *Foster v. Blakelock*, 5 B. & C. 328 (E. C. L. R. vol. 11), 8 D. & R. 48 (E. C. L. R. vol. 16), where it was held that the bailiff might sue for the sheriff's poundage upon levies, where he is accountable over to the sheriff.] There, the bailiff was specially employed. [WILLES, J.—In *Brewer v. Jones*, 10 Exch. 655,† it was held that a bailiff may recover from the attorney in the cause the costs of executing a writ of ca. sa., although the plaintiff was not specially nominated by the attorney.] That was a claim for mileage and personal expenses of the bailiff, not for poundage. 3. The attorney, at all events, is not the person responsible. In *Mayberry v. Mansfield*, 9 Q. B. 754 (E. C. L. R. vol. 58), it was held that the sheriff cannot recover his charges for executing a fi. fa. by action against the attorney in the cause, unless there be special circumstances from which a jury may infer an actual undertaking by the attorney to pay.(b)

\**Keane*, in reply.—*Colls v. Coates* is a very different case from the present: there, a tender was made to the under-sheriff before [\*557 any seizure. Nor is this case affected by *Rex v. Robinson*. As to the right of the bailiff to sue the attorney for poundage,—it is true no authority, except the case of *Foster v. Blakelock*, 8 D. & R. 48 (E. C. L. R. vol. 16), 5 B. & C. 328 (E. C. L. R. vol. 11), can be found for an action by the bailiff for poundage. But there are authorities to show that he may sue for the fees settled by the Judges under the 7 W. 4

(a) See *Holmes v. Sparkes*, 12 C. B. 242 (E. C. L. R. vol. 74).

(b) Actions by the bailiff against the attorney for caption-fees and conduct-money were sustained in *Newton v. Chambers*, 1 D. & L. 869, *Seal v. Hudson*, 4 D. & L. 760, *Maile v. Mann*, 2 Exch. 608,† 6 D. & L. 42, and *Walbank v. Quarterman*, 3 C. B. 94 (E. C. L. R. vol. 54).

In *Banbury v. Matthews*, 1 Car. & K. 380 (E. C. L. R. vol. 47), the sheriff sued for his poundage.

& 1 Vict. c. 55; and it is submitted that there is no difference in this respect between those fees and the poundage under the statute 29 Eliz. c. 4. The title of the Act is "An Act for better regulating the fees payable to sheriffs upon the execution of civil process." It recites that "it is expedient to amend the laws relating to the fees payable to sheriffs, under-sheriffs, deputy sheriffs, sheriffs' agents, bailiffs, and others the officers or ministers of sheriffs in England and Wales, and to give the Courts of record at Westminster Hall a due control over such fees; and also to provide a summary remedy against such officers and others as shall extort or receive other or greater fees than by law they shall be entitled to." It then proceeds to repeal part of the 42 E. 3, c. 9, the 1 H. 5, c. 4, and part of the 23 H. 6, c. 9; and s. 2 enacts, "from and after the passing of this Act, it shall be lawful for sheriffs, or their officers concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several Courts \*558] of law at Westminster charged with the \*duty of taxing costs in such Courts, under the sanction and authority of the Judges of the said Courts respectively." And by s. 3, any sheriff or other officer taking more is declared to be guilty of a contempt of Court, and punishable accordingly. For the fees allowed under that statute, it has been held that the sheriff or the bailiff may sue indifferently. If so, the language of the two Acts being substantially the same, there can be no reason why they may not equally sue for the fees given by the statute of Elizabeth.

ERLE, C. J.—In this case there was a seizure of goods by the sheriff under a writ of *fi. fa.* founded upon a judgment which was afterwards set aside for irregularity: and the question for us to determine, is, whether the sheriff is entitled to poundage under the statute 29 Eliz. c. 4, which enacts "that it shall not be lawful to or for any sheriff, under-sheriff, bailiff of franchises or liberties, nor for any of their or either of their officers, ministers, servants, bailiffs, or deputies, nor for any of them, by reason or colour of their or either of their office or offices, to have, receive, or take of any person or persons whatsoever, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods, or chattels of any person or persons whatsoever, more or other consideration or recompense than in the present Act is and shall be limited and appointed, which shall be lawful to be had, received, and taken, that is to say, 12*d.* of and for every 20*s.* where the sum exceedeth not 100*l.*, and 6*d.* of and for every 20*s.* being over and above the said sum of 100*l.* that he or they shall so *levy* or extend *and deliver in execution*, or take the body in execution for, by virtue and force of any such extent or execution whatever." The question is, whether a *seizure* of goods under the *fi. fa.* is \*559] a *levy* within that \*statute. I am of opinion that the sheriff has not levied so as to be entitled to poundage under that statute, until the goods seized have been turned into money. Here, without any default on the part either of the sheriff or the plaintiff, after the sheriff had commenced to levy by seizing the goods, his hand was stayed, and he was prevented from turning them into money. Inasmuch, therefore, as no money was made by him under the execution, I think he was not entitled to claim poundage. This being the view - take, it becomes unnecessary to decide the other question.

WILLIAMS, J.—I am entirely of the same opinion.

WILLES, J.—I am of the same opinion. I think the distinction is this,—where the execution has been irregularly conducted, and the sheriff has levied the money under it, he is entitled to his poundage, though the judgment may afterwards be set aside for irregularity; for, there, he has done all that he was required by the writ and warrant to do: so, where the sheriff is ready to perfect the levy by sale, and the parties compromise, and the sheriff in consequence withdraws; for, in that case, the plaintiff has had all the benefit of the sheriff's services, and the sheriff has done all he could do, and was ready to do the rest in obedience to the precept, and according to all ordinary principles he ought to be paid. But where, as here, the execution is stayed before actual levy, through no voluntary act of the plaintiff, it seems to me that the sheriff has not levied the money within the terms of the statute, and consequently is not entitled to poundage.

BYLES, J., concurred.

Judgment for the defendant.

\*GATTORNO v. ADAMS. *June 27.*

[\*560

A. contracted to sell to B. a specific cargo of wheat, described in the bought and sold note as "shipped per Diletta Mimbella, as per bill of lading dated September or October," and which was all on board at the date of the contract:—Held, that this did not necessarily entitle the buyer to rescind the contract on its turning out that all the wheat was not shipped before the bill of lading was given.

THIS was an action for breach of a contract for the sale of a cargo of wheat.

The first count of the declaration stated, that, by an agreement made by and between the plaintiff and the defendant, the plaintiff agreed to sell to the defendant, and the defendant agreed to buy from the plaintiff, certain goods, to wit, the cargo of Marianople wheat shipped per Diletta Mimbella, from Marianople, say about 5100 chetwerts, 10 per cent. more or less, as per bill of lading dated September or October (old style), at a certain price, to wit, 56s. 9d., less 2 per cent., per quarter of 492 lbs., delivered, sound or damaged, free on board at Marianople, including freight and insurance, the latter free of war risk to Cork, where the vessel was to discharge afloat, calling at Queenstown or Falmouth for orders; reckoning one hundred chetwerts equal to seventy-two quarters until weight should be ascertained: payment in London by deposit of 750*l.*, balance to be paid on arrival of vessel, in cash, allowing interest at 5 per cent. per annum for the unexpired term of three months from the date of bill of lading, in exchange for bill of lading and letter of guarantee of the insurance: and it was thereby further agreed, that, in case of any dispute, the said contract should not be void; it being agreed by the plaintiff and defendant to leave the same to two London corn-factors mutually chosen, or their umpire, and to be bound by their decision: eighteen running days to be allowed for discharge, to commence from vessel being ready; and demurrage 10*l.* per day for any time consumed beyond the eighteen days: Buyer to have the option of rejecting twenty quarters, if damaged; \*but all other damaged to be paid for as if sound: The vessel to have the option of calling

[\*561

at any port or ports in the Mediterranean: Averment, that, before this action was brought, the plaintiff had done all things, and all things had happened, and all conditions had been fulfilled, and all times had elapsed, necessary to entitle the plaintiff to have the said cargo accepted by the defendant and paid for by the defendant according to the terms of the said agreement, and to maintain this action against the defendant; yet the defendant did not nor would accept the said cargo, or any part thereof, nor pay for the same according to the terms of the said agreement or otherwise, but therein wholly made default, contrary to the terms of the said agreement; by reason whereof the plaintiff had lost the price of the said cargo, and had incurred large costs and charges in keeping the same, and had been compelled to resell the same at a great loss, and had been otherwise damnified.

Second plea,—that the contract in the first count mentioned was made in London on the 3d of December, 1861, by bought and sold notes signed on behalf of the plaintiff and defendant respectively; that the bought note was and is in the words and figures following, that is to say,—“London, the 3d December 1861. Bought from Sebastiano Gattorno, Esq., London, on account of James Berry Adams, Esq., Cork, the cargo of Marianople wheat shipped per Diletta Mimbella, from Marianople, say, about 5100 chetwerts, 10 per cent. more or less, as per bill of lading dated September or October, O. S., at the price of 56s. 9d. (say fifty-six shillings and nine pence), less 2 per cent., per quarter of 492 lbs., delivered, sound or damaged, at Marianople, including freight and insurance, the latter free of war risk to Cork, where the vessel is to discharge afloat, calling at Queenstown or Falmouth for \*orders; reckoning 100 chetwerts equal to 72 qrs.; \*562] no charge for demurrage, being captain's property until weight be ascertained: Our half of commission paid by seller: payment in London by deposit of 750*l.*; balance to be paid on arrival of vessel, allowing interest at 5 per cent. per annum for the unexpired term of three months from date of bill of lading, in exchange for bills of lading and letter of guarantee of the insurance: In case of any dispute, this contract not to be void; it being agreed by buyers and sellers to leave the same to two London corn-factors mutually chosen, or their umpire, and to be bound by their decision; eighteen running days to be allowed for discharge, to commence from vessel being ready, and demurrage 10*l.* per day for any time consumed beyond the eighteen days: Buyer to have the option of rejecting 20 quarters, if damaged; but all other damaged to be paid for as if sound: vessel to have the option of calling at any port or ports in the Mediterranean.” That the sold note was similar to the bought note, *mutatis mutandis*; and that the said bill of lading mentioned and referred to in the said bought and sold notes respectively was dated on the 30th of October (old style), and purported that the said cargo had been and was shipped on board the said vessel before and at the time it bore date; and the defendant says that the said cargo had not been nor was it shipped on board the said vessel in September or October (old style) mentioned in the said bought and sold notes respectively; but, on the contrary thereof, a small and immaterial portion only of the said cargo, to wit, one third part thereof, was shipped in and on board the said vessel at the date of the said bill of lading, and the residue of the said cargo was not shipped on board the said vessel until a long

material, and substantial time, to wit, three weeks, after the expiration of the \*said month of October (old style) in the said contract [\*563 mentioned.

Replication,—that ships of the size of the *Diletta Mimbella* could not and cannot load the whole of their cargoes at Marianople, and that, before and at the time of making the contract, according to the usage and custom of the port of Marianople, well known to all persons trading there, ships of the size of the *Diletta Mimbella* were accustomed to take on board part of their cargoes at Marianople, and to ship the residue after crossing the bar, the said residue being brought alongside at Marianople in lighters, and taken from Marianople to the bar in such lighters, and for the captains of such ships to sign bills of lading for the whole cargo as soon as the said lighters are alongside the ship: That the *Diletta Mimbella* shipped during the said months of September and October (old style) as much of the cargo as she could load at Marianople; and that, before the 31st of October, 1861 (old style), the residue of the said cargo was brought alongside the ship at Marianople in lighters, in accordance with the said usage; and that afterwards the same was, in accordance with the said usage, taken from Marianople to the bar in such lighters, and there shipped on board the said ship: and that the whole of the said cargo was shipped in accordance with the said usage; and that the captain signed the said bill of lading in accordance with the said usage after the said residue was so alongside the said ship as aforesaid: And that, before action brought, all things had happened to render the said usage binding on the defendant, and to entitle the plaintiff to set up the same as an answer to the defendant's plea.(a)

\*The plaintiff also demurred to the second plea; the ground of demurrer stated in the margin being, "that there is no warranty in the contract, that the cargo was all shipped in September or October, old style; that the reference to the bill of lading does not amount to a warranty; that the contract is for the sale of a specific cargo, and that it is not made conditional on the cargo having been shipped by the time mentioned; that the defendant was not justified in refusing to accept the cargo, but that his remedy, if any, was by cross-action; and that the second plea showed that the warranty, if any, was complied with." [\*564

The defendant also demurred to the replication; the ground of demurrer stated in the margin being, "that the replication to the second plea is a departure from the declaration; that the usage or custom set up in the said replication is unreasonable and repugnant; and that the custom or usage, being to contradict a written instrument, cannot be supported in law." Joinders.

*Lush, Q. C.* (with whom was *Honyman*), for the plaintiff.(b)—The

(a) Quære, what warrant is there for this novel application of the general averment of performance given by the Common Law Procedure Act, 1852?

(b) The points marked for argument on the part of the plaintiff were as follows:—

"That the words, 'as per bill of lading, dated, &c.,' do not amount to a warranty that the bill of lading was so dated,—that the said words, even if untrue, are only matter for cross-action,—that, even if the bill of lading were not dated as it is stated to be, the defendant (this being the sale of a specific cargo) is not entitled to reject the same,—that, if there be any warranty at all, it is only that the bill of lading should bear date in September or October, and that it appears by the pleadings that the bill of lading was in fact so dated,—that it appears by the

\*565] plea is no answer to the action. \*The statement in the contract that the wheat was "shipped per Diletta Mimbella as per bill of lading dated September or October," is no warranty on the part of the seller that the cargo had actually been shipped at the date of the bill of lading. The contract is for a specific cargo; and the buyer would get what he bargained for, even if the representation were untrue. At all events, assuming the plea to be good, the replication, which sets up a usage of the port, which must be taken to have been known to both parties, and is admitted to exist, is a good answer to the plea.

\*566] *Bovill, Q. C.* (with whom was *Raymond*), *contra* (a)—\*The second plea is a good answer to the declaration. The contract is for a quantity of wheat shipped as per bill of lading dated September or October. That is a warranty or condition that the wheat has been shipped in accordance with the bill of lading. That condition was not complied with; for, the shipment did not take place until three weeks after the month of October. [WILLIAMS, J.—It was shipped at the date of the contract.] It would seem so. It was important for many purposes,—amongst others, to regulate the insurance, and to enable him to judge of the probable time of arrival of the wheat and its condition when it should arrive,—that the buyer should have accurate information as to the time of shipment. The period of shipment was as much a condition as was the seller's representation in *Bannerman v. White*, 10 C. B. N. S. 844 (E. C. L. R. vol. 100), that the hops had not been treated with sulphur in their cultivation. There are numerous cases of conditions in charter-parties,—for instance, in *Glaholm v. Hays*, 2 M. & G. 257 (E. C. L. R. vol. 40), 2 Scott N. R. 471, where the words were "the vessel to sail from England on or before the 4th of February next;" and *Ollive v. Booker*, 1 Exch. 416,† where the words were "now at sea, having sailed three weeks ago, or thereabouts,"—the non-compliance, with which has been held to absolve the charterer from the performance of his contract. With regard to the custom alleged in the replication, that clearly cannot be binding on a party who is not shown to have ever traded to the port,

replication that the bill of lading was dated in accordance with the usage of the port,—that the demurrer to the replication admits the usage to be as alleged,—that the replication is no departure from the declaration,—that, even if it were, the objection would not be available on general demurrer, but would be merely ground for applying to have the pleadings reformed,—that the replication involves no contradiction to the written contract set out in the plea, but explains why the bill of lading was dated on the day it bears date,—and that the custom alleged in the replication is just and reasonable, and binding on the defendant."

(a) The points marked for argument on the part of the defendant were as follows:—

"That it was an essential part of the contract that the cargo had been shipped on board the *Diletta Mimbella* at the date of the bill of lading,—that the stipulation that it had been so shipped either amounted to a warranty or to a condition precedent, and in either view the non-compliance with that stipulation justified the defendant in refusing to accept the cargo,—that it appears on the record that the plaintiff was never ready and willing to deliver to the defendant the cargo described in and agreed to be sold by the contract,—that it appears on the record that the defendant was justified in refusing to accept the cargo shipped on board the *Diletta Mimbella*,—that the custom set up in the replication is bad in law, because it is unreasonable, inasmuch as it contradicts the written contract, and attempts to justify a false statement both in the contract and in the bill of lading,—that, on the face of the bill of lading and contract, there is nothing to enable the purchaser to ascertain whether the cargo has been actually shipped on board the vessel or in lighter as described in the replication,—that the custom is vague and uncertain, and calculated to mislead,—and that the replication is a departure from the declaration."

even assuming it is well alleged. But, if \*the contract imports a warranty that the wheat was shipped in September or October, [\*567 the custom is immaterial.

*Lush*, in reply.—“Shipped in September or October” are mere words of description, and never were intended or understood to import a warranty. [WILLIAMS, J.—If it is a condition, I do not see that the replication does you any good.] According to the usage of the port of Marianople, the word “shipped” means, not that the wheat is actually on board the vessel, but that the captain has so far charge of it that the owners are accountable as if it were actually shipped: and the replication alleges that all things had happened to make the custom binding upon the defendant. [WILLES, J.—It is not usual to sign bills of lading until the goods are actually on board. Until they are so, a bill of lading is of no validity.(a) But, if the consignor does afterwards put the goods on board, the bill of lading attaches just as if they had been on board at the time. That is a better point than your replication suggests.]

WILLIAMS, J.—I am of opinion that our judgment should be for the plaintiff. It is unnecessary to give any opinion as to whether these bought-and-sold notes contain a representation that the cargo was on board at the date of the bill of lading; because, assuming that they do, that does not amount to a condition, so as to enable the defendant to relieve himself from the performance of his contract if it were untrue.

WILLES, J.—I am of the same opinion. This is a contract for the purchase of a specific cargo of wheat, and on board a specific vessel. The contract goes on to allege that the wheat was “shipped as per bill of \*lading dated September or October.” The reason of this [\*568 was, that the agent who effected the sale was unaware of the precise day on which the wheat would be shipped. I express no opinion as to the effect of a bill of lading for cargo not on board. It is enough to say that this does not import a condition, and consequently there must be judgment for the plaintiff.

KEATING, J., concurred.

Judgment for the plaintiff.

(a) See *Grant v. Norway*, 10 C. B. 665 (E. C. L. R. vol. 70).

SIR JOHN BROCAS WHALLEY SMYTHE GARDINER, Bart.,  
v. ELIZABETH JANE JELlicoe, Widow. July 12.

A. by his will devised an estate called the Clerk Hill estate to his first son, James, for life, remainder to his first and other sons in tail male, with like remainders to his (the testator's) second and third sons Robert and John for life, and their sons,—remainder to the sons of James in tail general, with like remainders to the sons of Robert and John,—remainder to the daughters of James in tail male, with like remainders to the daughters of Robert and John,—remainder to the daughters of James in tail general, with like remainders to the daughters of Robert and John,—remainder to the testator's daughter Elisabeth for life, with remainder to her sons in tail male,—remainder to his second and third daughters and their sons in tail male,—remainder over to the testator's own right heirs.

By a shifting clause,—reciting that by the will of Sir W. Gardiner certain estates were limited in trust for the testator's brother J. W. for life, with remainder to his first and other sons in tail male, with remainder to himself (the testator) for life, with remainder to his first and other sons

in tail male, with divers remainders over in favour of his issue; and that it was his will and mind that the Clerk Hill estate should not be enjoyed, so long as he might legally thereby prevent it, consistent with the limitations theretofore mentioned in other respects, and before the ultimate remainder or reversion thereinbefore directed to be limited should take place and come into actual possession, by any one of his sons or daughters, or their issue, after such son or daughter or such their issue should come into possession of the said Gardiner estate,—directed, that, as often as the Gardiner estate should come to the possession of any of his said sons or daughters, or any of their issue, the person next in remainder according to the limitations thereinbefore mentioned to the Clerk Hill estate after the person or persons who should so come to the possession of the Gardiner estate, should be entitled to and come to the possession of the Clerk Hill estate for the estate and interest thereinbefore mentioned and directed to be limited to him or her respectively, and so from time to time as often as that the event then in his (the testator's) contemplation might happen, in such manner as if the person or persons so becoming possessed of the Gardiner estate had died or was then dead without issue; and that the uses for which the Clerk Hill estate was thereinbefore directed to be conveyed should accordingly cease, determine, and shift from time to time, so as the said two estates might never as long as he (the testator) might legally prevent the same consistent with the limitations thereinbefore mentioned in other respects, and before the ultimate remainder or reversion thereinbefore directed to be limited thereof should take place and come into actual possession, be holden or enjoyed in possession by any one of his sons or daughters or their issue together and at the same time.

By a codicil to his will, the testator,—reciting, that, by the death of his late brother J. W. without issue, he had become entitled for life to the Gardiner estate under the will of Sir W. Gardiner, with remainder to his first and other sons in tail, with divers remainders over in favour of his issue, by which event the Gardiner estate would upon his (the testator's) death descend and go to his eldest son James,—revoked and annulled the limitation in his will mentioned of the Clerk Hill estate in favour of his said son James; it being still his will and intention that the Clerk Hill estate should not be held or enjoyed by any one of his sons or daughters or their issue together with the Gardiner estate.

At the death of the testator, in 1805, his eldest son (James) entered into possession of the Gardiner estate, and in 1807 he suffered a recovery, declaring the uses thereof to himself in fee.

The second son of the testator (Robert), by his guardians (he being then an infant), entered into possession of the Clerk Hill estate; and, soon after he attained his majority, he filed a bill in Chancery, praying that it might be declared that he was entitled to an immediate estate for life in the Clerk Hill estate, with remainder to his first and other sons in tail male; and, in July, 1814, under a decree of the then Master of the Rolls (Sir W. Grant), a conveyance was made accordingly to his first and other sons successively in tail male, and, in default of such issue, to the uses declared by the testator's will.

Robert remained in possession of the Clerk Hill estate down to the time of his death in 1841; and, after the death (without issue) of the other two sons of the testator, his (the testator's) eldest daughter (the now defendant) entered into possession of the Clerk Hill estate under the limitations contained in the will of her father:—

Held, by Erle, C. J., Willes, J., and Byles, J., that the defendant was not, in the events which had happened, entitled under her father's will to the Clerk Hill estate; for, that the effect of the shifting clause was simply to accelerate the next remainder in tail male, and that it did not affect the subsequent estate in tail general (which the plaintiff, the eldest son of the testator's eldest son, claimed), which might descend to persons who could not have acquired the Gardiner estate so as to come within the operation of the shifting clause.

Held, by Williams, J., that, on the true construction of the shifting clause, James, the testator's eldest son, must be deemed to have “died without issue,” and that consequently the plaintiff, so far as related to the rights of the defendant under the will, must be regarded as a non-existing person.

THIS was an action of ejectment brought to recover the possession of certain lands in the county of Lancaster, called “The Clerk Hill Estate,” which the plaintiff claimed to be entitled to under the will  
\*569] of his grandfather, Sir James Whalley Smythe Gardiner, Bart., deceased.

The cause was tried before Mellor, J., at the last Spring Assizes at Liverpool.

The facts which appeared in evidence were in substance as follows:—The Clerk Hill estate was held in fee simple until his death

by Sir James Whalley Smythe Gardiner, Bart. No. 1,—hereafter called "Sir James Gardiner, the testator,"—who up to the 19th of November, 1797, when he came into possession of the Gardiner estate (hereinafter mentioned), was known as "James Whalley, of Clerk Hill."

Sir James Gardiner, the testator, was twice married,—first, on the 28th of October, 1784, to Elizabeth Assheton, who died on the 8th of September, 1785,—secondly, to Jane Master, on the 8d of December, \*1789. This latter survived the testator. By the first marriage he had issue only one son, James Whalley, who afterwards became Sir James Whalley Smythe Gardiner, Bart.,—hereafter called "Sir James Gardiner No. 2." By his second marriage, Sir James Gardiner, the testator, had four sons,—Robert Whalley, John Master Whalley, William Whalley, and Thomas Whalley,—and several daughters, of whom the now defendant Elizabeth Jane, the widow of Samuel Jellicoe, born on the 29th of January, 1792, was the eldest. [570

The state of the family will appear by the pedigree following, which is admitted to be correct.

Sir William Gardiner, Bart., of Roche Court, in the county of Southampton (the cousin of Sir James Gardiner, the testator), by his will, dated the 20th of January, 1778, devised to Stephen Barney and William Humphreys all his manor or reputed manor of North Fareham, otherwise Roche Court, with the appurtenances, and all other his manors and reputed manors, messuages, lands, tenements, rents, tithes, and hereditaments whatsoever, as well freehold as copyhold and customary, situate, lying, or being in North Fareham, and in the several parishes of South Fareham, Wickham, Titchfield, Bramley, Sherborne, St. John, alias East Sherborne, and Pamber, or any of them, or elsewhere in the said county of Southampton, he having duly surrendered such parts of the said premises as were copyhold or customary to the use of his will, To have and to hold all and singular the said devised premises unto them the said Stephen Barney and William Humphreys and their heirs, To the several uses, intents, and purposes, upon the trusts, and subject to the provisos and powers thereafter limited, declared, or expressed concerning the same, that is to say,—subject to certain legacies and annuities, "To the use and behoof of the said Stephen Barney and William \*Humphreys and their heirs, in [572 trust to permit and suffer John Whalley, Esq., son of my late cousin Grace Whalley, deceased, the widow of Robert Whalley, late of the city of Oxford, doctor of physic, for and during the term of his natural life, to receive and take the rents, issues, and profits thereof without impeachment of waste (except in not repairing and maintaining the several messuages and buildings upon the said devised premises, and also except in felling and cutting down timber-trees thereon before the same shall be ripe and at full growth); and, from and immediately after the decease of the said John Whalley, in trust to permit and suffer the first son of the body of the said John Whalley, and the heirs male of the body of such first son lawfully issuing, to receive and take the rents, issues, and profits thereof, without impeachment of waste, except as aforesaid; and, for default of such issue, in trust to permit and suffer the second son of the body of the

GRACE GARDINER, — ROBERT WHALLEY.

Cousin of Sir William Gardiner, Bart., who died 1779

Maria Newcombe, — Sir John Whalley, Bart.  
 Married July 7, 1797, (assumed the additional  
 Died July 19, 1840. surnames of Smythe  
 and Gardiner), and died  
 S. P. 18 Nov. 1797.

— Sir James Whalley Smythe Gardiner, — Jane Master  
 Bart. (No. 1). He assumed the (second wife),  
 additional surnames of Smythe and Married Dec.  
 Gardiner by Royal license dated 3, 1789. Died.  
 Dec. 18, 1797. Died, Aug. 21, 1806.

Elizabeth Asheton —

Sir James Whalley — Frances Mosley.  
 Smythe Gardiner, Died Dec. 16,  
 Bart. (No. 2). 1866.  
 Born, Sept. 2, 1786.  
 Married, Aug. 14,  
 1807. Died, Oct.  
 23, 1861.

Robert Whalley.  
 Born, Oct. 7,  
 1790. Died, Nov.  
 1841. S. P.

ELIZABETH JANE WHALLEY, the  
 eldest daughter. Born, Jan. 1,  
 Born, Jan. 29, 1798. Died,  
 1792. Married, Oct. 29, 1861.  
 Oct. 14, 1819.

John Master — Hannah Night-  
 Whalley. ingale. Mar-  
 Born, July 29, ried, Dec. 6,  
 1796. Died, S. P. 1899.

William Whalley. Thomas Whalley.  
 Born, July 29, Born, Aug. 18,  
 1796. Died, S. P. 1797. Died, 8,  
 March 10, 1860. P. in April, 1800.

Other daughters.

Frances Whalley Frances  
 Smythe Gardiner. Elisabeth.  
 Born, May 8, 1806.  
 Died, May 23,  
 1808.

Barbara Whalley.

James Whalley James Whalley  
 Smythe Gardiner (No. 3). Born, Sept. 5, 1812.  
 Died, Oct. 11, 1857. S. P.

JOHN BROOKS, now Sir A third  
 JOHN BROOKS WHALLEY son and  
 1st SMYTHE GARDINER two other  
 was, Bart. daughters.  
 March 18, 1814.  
 Mainting.

Samuel James Gardiner  
 Jellicoe, her eldest son. Born, May 27,  
 1823.

James Stroymanham  
 Whalley, their only child. Born  
 Dec. 7, 1840.  
 Died, S. P. Sept.  
 11, 1845.

— Samuel Jellicoe.  
 Died, Nov. 9, 1861.

said John Whalley, and the heirs male of the body of such second son lawfully issuing, to receive and take the rents, issues, and profits thereof, without impeachment of waste, except as aforesaid; and, for default of such issue, in trust to permit and suffer the third, fourth, fifth, sixth, seventh, and all and every other sons and son of the body of the said John Whalley severally and successively and in remainder one after another, as they and every of them shall happen to be in priority of birth and seniority of age, and the several and respective heirs male of the several and respective bodies and body of all and every such sons and son lawfully issuing, to receive and take the rents, issues, and profits thereof, without impeachment of waste, except as aforesaid,—the elder of such sons and the heirs male of his body issuing being always to be preferred and to take before the younger of such sons and the heirs male of his and their body or bodies issuing: Provided always, and the uses \*hereinbefore limited to the said Stephen Barney and William Humphreys and their heirs as aforesaid, in trust for the said [\*573 John Whalley for his life, and afterwards for the sons of the said John Whalley and their heirs in tail male, shall cease, determine, and be void when and as soon as the said John Whalley or either of his sons or any issue of either of them which shall be living in the lifetime of the said John Whalley, or in the lifetime of James Whalley, a demye of Magdalen College in the said city of Oxford, second son of my said cousin Grace Whalley, or of Thomas William Whalley, hereinafter named, shall become seised of or entitled for life or in tail to the manors, messuages, lands, tenements, and hereditaments in and by the last will and testament of my late cousin Bernard Brocas, Esq., deceased, limited after the several estates for life or in tail of several persons therein named, to the use of the said John Whalley for his life and then to his first and every other son in tail male successively: But, if the remainders in and by such will of the said Bernard Brocas limited to the use of the said John Whalley for his life, and then to his first and every other son in tail male, shall be barred and destroyed before the said John Whalley or either of his sons, or any issue of either of them, shall become seised of or entitled to the said manors, messuages, lands, tenements, and hereditaments by the said will of the said Bernard Brocas devised as aforesaid, then and in such case the said Stephen Barney and William Humphreys and their heirs shall from thenceforth stand seised of the premises hereby devised to them as aforesaid, to the use and behoof of the said John Whalley for and during the term of his natural life, without impeachment of waste, except in not repairing and maintaining the several messuages and buildings upon the said premises hereby devised, and also except in felling and cutting down timber-trees before the \*same shall be [\*574 ripe and at full growth; and, from and immediately after the determination of that estate, by forfeiture or otherwise, in the lifetime of the said John Whalley, to the use and behoof of the said Stephen Barney and William Humphreys and their heirs for and during the natural life of the said John Whalley, in trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require, but nevertheless to permit the said

John Whalley to receive and take the rents, issues, and profits of the said premises hereby devised during his life; and, from and immediately after the decease of the said John Whalley, to the use and behoof of the first son of the body of the said John Whalley and the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use and behoof of the second son of the body of the said John Whalley and of the heirs male of the body of such second son lawfully issuing; and, for default of such issue, to the use and behoof of the third, fourth, fifth, sixth, seventh, and all and every other son and sons of the body of the said John Whalley severally, successively, and in remainder, one after another, as they and every of them shall happen to be in priority of birth and seniority of age, and of the several and respective heirs male of the several and respective bodies and body of all and every such sons and son lawfully issuing, the elder of such sons and the heirs male of his body issuing being always to be preferred and to take before the younger of such sons and the heirs male of his and their body and bodies issuing: And, for default of such issue, or upon any sooner determination of the said trusts by this my will limited and appointed for the benefit of the said John Whalley for life and his sons in tail male, which \*575] shall \*first happen, my said trustees and their heirs shall from thenceforth stand seised of the premises hereby devised as aforesaid, to the use and behoof of the said James Whalley for and during the term of his natural life, without impeachment of waste (except in not repairing and maintaining the several messuages and buildings upon the said hereby devised premises, and also except in felling and cutting down timber-trees thereon before the same shall be ripe and of full growth); and, from and immediately after the determination of that estate by forfeiture or otherwise in the lifetime of the said James Whalley, to the use and behoof of the said Stephen Barney and William Humphreys and their heirs for and during the natural life of the said James Whalley, in trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require, but nevertheless to permit the said James Whalley to receive and take the rents, issues, and profits of the said hereby devised premises during his life; and, from and immediately after the decease of the said James Whalley, to the use and behoof of the first son of the body of the said James Whalley, and of the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use and behoof of the second son of the body of the said James Whalley, and of the heirs male of the body of such second son lawfully issuing; and, for default of such issue, to the use and behoof of the third, fourth, fifth, sixth, seventh, and all and every other sons and son of the body of the said James Whalley severally, successively, and in remainder, one after another, as they and every of them shall happen to be in priority of birth and seniority of age, and of the several and respective heirs of the several and \*576] respective bodies and body of all and every such sons and \*son lawfully issuing, the elder of such sons and the heirs male of his body issuing being always to be preferred and to take before the younger of such sons and the heirs male of his and their body and

bodies issuing: And, for default of such issue, to the use and behoof of Thomas William Whalley, of the city of Oxford aforesaid, gentleman, my godson, and third son of my late cousin the said Grace Whalley, for and during the term of his natural life, without impeachment of waste, &c. [with like remainders to his sons and their heirs male]: And, for default of such issue, to the use and behoof of the first daughter of the body of the said John Whalley, and of the heirs male of the body of such first daughter lawfully issuing; and, for default of such issue, to the use and behoof of the second daughter of the body of the said John Whalley, and of the heirs male of the body of such second daughter lawfully issuing; and, for default of such issue, to the use and behoof of the third, fourth, fifth, sixth, seventh, and all and every other the daughters and daughter of the body of the said John Whalley, severally, successively, and in remainder, one after another, as they and every of them shall happen to be in priority of birth and seniority of age, and of the several and respective heirs male of the several and respective bodies and body of all and every such daughters and daughter lawfully issuing, the elder of such daughters and the heirs male of her body issuing being always to be preferred and to take before the younger of such daughters and the heirs male of her and their body and bodies issuing: And, for default of such issue, to the use and behoof of the first daughter of the body of the said James Whalley and the heirs male of the body of such first daughter lawfully issuing; and, for default of such issue, to the use and behoof of the second daughter of the body of the said James Whalley and the heirs male of the body of such second daughter lawfully issuing; and, for default of such issue, to the use and behoof of the third, fourth, fifth, sixth, [\*577 seventh, and all and every other the daughters and daughter of the body of the said James Whalley, severally, successively, and in remainder, one after another, as they and every of them shall happen to be in priority of birth and seniority of age, and of the several and respective heirs male of the several and respective bodies and body of all and every such daughters and daughter lawfully issuing, the elder of such daughters and the heirs male of her body issuing being always to be preferred and to take before the younger of such daughters and the heirs male of her and their body and bodies issuing: [Then followed like remainders to the first and other daughters of Thomas William Whalley and their heirs male, in succession.] Provided always and it is my will that it shall be lawful to and for the said John Whalley and every other person who shall become seised of or entitled to the said hereby devised premises, or the rents and profits thereof, for life, or in tail, and be in the actual possession of the said premises, or in receipt of the rents, issues, and profits thereof by virtue of any of the limitations herein contained, from time to time to make or grant any new lease or leases thereof, or of any part or parts thereof, by indenture or indentures, to any person or persons, for any term or number of years not exceeding twenty-one years, to commence from the making of such lease or leases or from Michaelmas then next, in possession, and not in reversion or by way of future interest, so as upon every such lease there be reserved and made payable, by equal half-yearly payments, during the continuance thereof,

to be incident to and go along with the remainder or reversion of the premises so leased, the best and most improved rent or rents that can \*578] be then \*reasonably had or obtained for the same, without taking any fine or other thing by way of fine or income for granting any such lease, and so as the lessee or lessees be not made dispunishable of waste by any clause or words to be inserted in any such lease, and so as in every such lease there be contained a clause of re-entry or non-payment of the rent or rents thereby to be reserved by the space of forty days, and so as the lessee or lessees in every such lease do seal and deliver a counterpart thereof: And whereas the copyhold or customary parts of the premises hereinbefore devised to the said Stephen Barney and William Humphreys and their heirs as aforesaid do lie convenient to be always held and occupied with my freehold lands, and the same copyhold or customary parts or some of them are of the nature of Borough English, and do descend in a manner different from freehold lands,—now I declare my will and intention to be that the said copyhold and customary premises shall from time to time go and descend and be held with my said freehold lands according to the limitations thereof aforesaid; and I hereby direct the said Stephen Barney and William Humphreys and their heirs to make such surrenders of the said copyhold or customary parts as shall be advised for that purpose, and that in the mean time they shall stand and be seised of the same in trust for every person to whom my said freehold lands, or the rents and profits thereof, shall from time to time belong, according to the limitations thereof, subject nevertheless to the rents and payments hereinbefore and hereinafter charged thereon. [Then followed certain charges of legacies and annuities.]

Sir William Gardiner died in 1779, without revoking or altering his will: and, upon his death, Sir John Whalley Smythe Gardiner, Bart., entered into possession of the Gardiner estate, and continued in \*579] \*possession until his death, which took place on the 19th of November, 1797, without having had any issue, leaving his brother and heir at law, James Whalley (herein called Sir James Gardiner, the testator), him surviving.

James Whalley, of Clerk Hill (afterwards Sir James Whalley Smythe Gardiner, Bart.), by his will, dated the 2d of July, 1796, after providing for the payment of debts and funeral and testamentary expenses and legacies,—gave and bequeathed unto Streynsham Master and John Atherton, their executors, administrators, and assigns, all the household goods and furniture, plate, linen, books, and china whatsoever in or belonging to his capital mansion-house called Clerk Hill, upon trust to permit and suffer the same to be possessed and used by the person and persons who for the time being should be entitled to the said mansion-house and other his real estates thereafter devised and directed to be settled, or the rents and profits thereof, under the limitations thereafter mentioned, and, when any person should become seised of the fee simple in possession of the said mansion-house and other his said real estates, upon trust to convey the same household goods and furniture, plate, linen, books, and china to such person or persons as he or she should direct, immediately after his or her becoming seised of his said mansion-house and other real estates in fee simple as aforesaid, it being his (the testator's) intention that

the same should remain unalienable and be enjoyed along with his said mansion-house as long as the law would permit. And after making an addition to the jointure of his widow, the testator proceeded as follows :—And as to, for, and concerning all my moiety of the manor or reputed manor of Whalley aforesaid, and all and every my messuages, lands, tenements, hereditaments, and real estate whatsoever and wheresoever \*(save and except my copyhold estate hereafter [\*580 mentioned and devised to be sold), with their and every of their appurtenances (subject to the jointure of my said wife Jane Whalley, and the above-mentioned addition thereto, and also subject to the sum of 6000*l.* charged upon part thereof by the said settlement made previous to my marriage with her my said present wife for the benefit of the issue of the said marriage), I give and devise the same moiety, messuages, lands, tenements, hereditaments, and real estates, and every part thereof, unto the said Streynsham Master and Adam Cottam and their heirs and assigns, Upon trust that they the said Streynsham Master and Adam Cottam, or the survivor of them, or the heirs or assigns of such survivor, do and shall after my decease convey, settle, limit, and assure, by good and sufficient deeds and conveyances, all and singular the same moiety, lands, tenements, hereditaments, and real estates aforesaid (save and except and subject as aforesaid), to the said William Assheton and John Atherton and their heirs, to the several uses, and upon the several trusts, and to and for the several intents and purposes, and under and subject to the several charges, powers, provisoes, conditions, declarations, and limitations, and that the same may go and be enjoyed in manner and form hereinafter limited, expressed, and declared of and concerning the same, that is to say, To and to the use of or in trust for my eldest son James Whalley and his assigns for and during the term of his natural life, without impeachment of or for any manner of waste (save and except as to cutting or felling down timber or wood, which I will and direct shall only be cut down or fallen under and in pursuance of the power and proviso hereinafter for that purpose contained); with remainder in the usual way to the said William Assheton and John Atherton, and their heirs, during the life of \*my said son James Whalley, to preserve the contingent [\*581 remainders hereinafter mentioned from being defeated or destroyed; with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the body of my said son James Whalley lawfully issuing, severally and successively, in tail male; with remainder to and to the use of or in trust for my second son, Robert Whalley, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste (save and except as to cutting or felling down timber or wood); with remainder, in the usual way, to the said William Assheton and John Atherton and their heirs, during the life of my second son Robert Whalley, to preserve the contingent remainders hereinafter mentioned from being defeated or destroyed; with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the body of my said second son Robert Whalley lawfully issuing, severally and successively, in tail male; with remainder to and to the use of my third son, John Master Whalley, and his assigns, for and during the

term of his natural life, without impeachment of or for any manner of waste (save and except as to cutting or felling down timber or wood), with remainder, in the usual way, to the said William Assheton and John Atherton, and their heirs, during the life of my said third son, John Master Whalley, to preserve the contingent remainders herein-after mentioned from being defeated or destroyed, with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the body of my said third son, John Master Whalley, lawfully issuing, severally and successively, in tail male; with remainder to and to the use of all and every other the son and sons of me the said testator hereafter to be born, severally and successively, as

\*582] they shall be in seniority of age and priority of birth, in tail male; with remainder to the said first, second, third, fourth, fifth, and all and every other the son and sons of the body of my said eldest son, James Whalley, lawfully issuing, severally and successively, in tail general, with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the body of my said second son, Robert Whalley, lawfully issuing, severally and successively, in tail general, with remainder to the said first, second, third, fourth, fifth, and all and every other the son and sons of the body of my said third son, John Master Whalley, lawfully issuing, severally and successively, in tail general; with remainder to and to the use of the first, second, third, fourth, fifth, and all and every the daughter and daughters of the body of my said eldest son, James Whalley, lawfully issuing, severally and successively, in tail male; with remainder to and to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of my said second son, Robert Whalley, lawfully issuing, severally and successively, in tail male; with remainder to and to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of my said third son, John Master Whalley, lawfully issuing, severally and successively, in tail male; with remainder to and to the use of the said first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of my said eldest son, James Whalley, lawfully issuing, severally and successively, in tail general; with remainder to and to the use of the said first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of my said second son, Robert Whalley, lawfully issuing, severally

\*583] and successively, in tail general; with \*remainder to and to the use of the said first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of my said third son, John Master Whalley, lawfully issuing, severally and successively, in tail general; with remainder to and to the use of all and every my said son and sons hereafter to be born, severally and successively, as they shall be in seniority of age and priority of birth, in tail general: with remainder to and to the use of Elizabeth Jane, my eldest daughter, and her assigns, for and during the term of her natural life, without impeachment of or for any manner of waste (save and except as to cutting or felling down timber or wood), with remainder, in the usual way, to the said William Assheton and John Atherton and their heirs during the life of the said Elizabeth Jane, my eldest daughter, to preserve the contingent remainders hereinafter

mentioned from being defeated or destroyed; with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the body of the said Elizabeth Jane, my said oldest daughter, lawfully issuing, severally and successively, in tail male; with remainder to and to the use of Barbara Smythe, my said second daughter, and her assigns, for and during the term of her natural life, without impeachment of or for any manner of waste (save and except as to cutting or felling down timber or wood), with remainder in the usual way to the said William Assheton and John Atherton and their heirs during the life of the said Barbara Smythe, my said second daughter, to preserve the contingent remainders hereinafter mentioned from being defeated or destroyed; with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the body of the said Barbara Smythe, my said second daughter, lawfully issuing, severally and successively, in tail male; with \*remainder to and to the use of Grace, my third daughter, and her assigns, [\*584 for and during the term of her natural life, without impeachment of or for any manner of waste (save and except as to cutting or felling down timber or wood); with remainder, in the usual way, to the said William Assheton and John Atherton and their heirs, during the life of the said Grace, my said third daughter, to preserve the contingent remainders hereinafter mentioned from being defeated or destroyed; with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the body of the said Grace, my said third daughter, lawfully issuing, severally and successively, in tail male; with remainder to and to the use of all and every other the daughter and daughters of me the said testator hereafter to be born, severally and successively, as they shall be in seniority of age and priority of birth, in tail male; with remainder to the said first, second, third, fourth, fifth, and all and every other the son and sons of the body of the said Elizabeth Jane, my said oldest daughter, lawfully issuing, severally and successively, in tail general; with remainder to the said first, second, third, fourth, fifth, and all and every other the son and sons of the body of the said Barbara Smythe, my said second daughter, lawfully issuing, severally and successively, in tail general; with remainder to the said first, second, third, fourth, fifth, and all and every other the son and sons of the body of the said Grace, my said third daughter, lawfully issuing, severally and successively, in tail general; with remainder to and to the use of the said first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said Elizabeth Jane, my said oldest daughter, lawfully issuing, severally and successively, in tail male; with remainder to and to the use of the said first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said Barbara Smythe, my said second daughter, lawfully issuing, severally and successively, in tail male; with remainder to and to the use of the said first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said Grace, my said third daughter, lawfully issuing, severally and successively, in tail male; with remainder to and to the use of the said first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said Elizabeth Jane, my said oldest daughter, lawfully

issuing, severally and successively, in tail general; with remainder to and to the use of the said first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said Barbara Smythe, my said second daughter, lawfully issuing, severally and successively, in tail general; with remainder to and to the use of the said first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said Grace, my said third daughter, lawfully issuing, severally and successively, in tail general; with remainder to and to the use of all and every my said daughter and daughters hereafter to be born, severally and successively, as they shall be in seniority of age and priority of birth, in tail general; with remainder or reversion to and to the use of my own right heirs: Provided always, and I do hereby declare that the devise or limitation hereinbefore contained and directed to be made to or in favour of my said son James Whalley is upon this express condition, that he, his executors, administrators, and assigns, do and shall release, relinquish, and give up all right, title, and interest which he or they can or may have or claim in or to a certain sum of 5000*l.* which by the settlement \*586] made previous to my marriage with my first wife, \*formerly Elizabeth Assheton, deceased, is directed to be raised for the issue of that marriage in the manner in that settlement mentioned: And I do hereby direct that the aforesaid devise or limitation to or in favour of my said son James and his issue shall be deemed and taken as a full satisfaction of and for the said sum of 5000*l.*, and as and for an advancement in lieu thereof; which said sum of 5000*l.* it is my will shall not be raised, but that the same sum do and shall sink for the benefit of the person or persons entitled to the real estates whereon it is charged: But, whereas in and by the last will and testament of Sir William Gardiner, late of Roche Court, in the county of Southampton, Bart., deceased, bearing date on or about the 20th of January, 1778, certain manors or reputed manors, messuages, lands, tenements, rents, tithes, hereditaments, and premises therein mentioned are limited and settled to or in trust for my said brother Sir John Whalley Smythe Gardiner, Bart., therein called John Whalley, Esq., for life, with remainder to his first and other sons in tail male, with remainder, in default of such issue, or upon any other sooner determination of the said trusts by the said will now in recital limited and appointed for the benefit of the said Sir John Whalley Smythe Gardiner, therein called John Whalley, for life, and his sons, in tail male, which should first happen, to the use of me the said James Whalley, for life, with remainder to my first and other sons in tail male, with divers remainders over in favour of my issue, and it being my will and mind that my said estates, tenements, and hereditaments hereinbefore given and devised to the said Streynsham Master and Adam Cottam and their heirs, in trust as aforesaid, and directed to be so settled and conveyed as aforesaid, shall not be held or enjoyed, so long \*587] as I may legally hereby prevent them consistent with the \*limitations hereinbefore mentioned in other respects, and before the ultimate remainder or reversion hereinbefore directed to be limited shall take place and come into actual possession, by any one of my sons or daughters, or his, her, or their issue, after such son or daughter, or such his, her, or their issue shall come into the possession

of the said estates, tenements, and hereditaments so as aforesaid limited and devised by the said recited last will of the said Sir William Gardiner, deceased; but, as often as such the estates, lands, tenements, and hereditaments so as aforesaid limited and devised by the said recited last will of the said Sir William Gardiner, deceased, shall come to the possession of any of my said sons or daughters, or any of their issue, that then the person next in remainder according to the limitations hereinbefore mentioned and directed to be made to my said estates, lands, tenements, and hereditaments after the person or persons who shall so come to the possession of the lands, tenements, hereditaments, estates, and premises so as aforesaid limited and devised by the said last will of the said Sir William Gardiner, shall be entitled to and come to the possession of my said estates, lands, tenements, and hereditaments, for the estate and interest hereinbefore mentioned and directed to be limited to him or her respectively, and so from time to time as often as this the event now in my contemplation may happen, in such manner and as if the person or persons so becoming possessed of the said estates, lands, tenements, and hereditaments so as aforesaid limited and devised by the said recited will of the said Sir William Gardiner, deceased, had died or was then dead without issue; and the uses for which my said estates, lands, tenements, and hereditaments are hereinbefore directed to be conveyed shall accordingly cease, determine, and shift from time to time, so as that the said two [\*588 several estates, the one formerly belonging to the said Sir William Gardiner, deceased, and the other now belonging to me, may never, so long as I may legally prevent the same consistent with the limitations hereinbefore mentioned in other respects, and before the ultimate remainder or reversion hereinbefore directed to be limited thereof shall take place and come into actual possession, be holden or enjoyed in possession by any of my sons or daughters, or his, her, or their issue, together and at the same time, but, on the contrary, in manner and form herein above mentioned; and such clauses, provisions, and declarations shall be inserted in such settlement of my said estates, lands, tenements, hereditaments, and premises hereinbefore directed to be made, as shall be proper and necessary to effectuate my will and intention in these the respects hereinbefore mentioned: Provided, nevertheless, that any such cesser or shifting of the uses or use for which my said estates, lands, tenements, and hereditaments shall be limited and settled pursuant to this my will, in consequence of the person for the time being possessed or entitled thereto becoming so as aforesaid possessed or entitled to the estates, lands, tenements, and hereditaments formerly belonging to the said Sir William Gardiner, Bart., deceased, shall not in anywise prejudice any jointure or jointures, term or terms, remedies, or powers for securing the same respectively, lease or leases, demise or demises as before such the shifting or cesser of such use or uses shall have been limited, settled, appointed, created, granted, or devised of or in the said estates, lands, tenements, hereditaments, and premises of me the said testator, or any of them, by any of my said sons or daughters or their issue respectively pursuant unto and by virtue of the powers hereinafter for those purposes contained."

\*589] \*The will then gave power to the testator's sons James Whalley, Robert Whalley, and John Master Whalley, when they should become possessed of the devised estates, to charge the same with a sum not exceeding 3000*l*. by way of jointure, and to grant leases; a power to the trustees, with the consent of the tenants for life in possession, to cut down timber, &c.; directions for the sale of the testator's copyhold property, and the disposal of the proceeds, &c., &c.

On the death of his brother, James Whalley succeeded to the baronetcy, and entered into possession of the Gardiner estate, and also of certain estates in Oxfordshire not in question in this cause.

By a codicil to his will, dated the 7th of February, 1799, he declared as follows:—"Whereas by the death of my late brother Sir John Whalley Smythe Gardiner, Bart., without issue, I am become entitled for life to certain estates, hereditaments, and premises mentioned in the last will and testament of Sir William Gardner, Bart., deceased, under and by virtue of the same will, with remainder to my first and other sons in tail male, with divers remainders over in favour of my issue, by which event the said estates, hereditaments, and premises will upon my death descend and go to my eldest son James Whalley,—I do therefore, consistently with my will, revoke and annul the limitation therein mentioned of my estates, lands, tenements, and hereditaments in favour of my said son James Whalley; it being still my will and intention that my said estates, lands, tenements, and hereditaments in my said will mentioned shall not be held or enjoyed by any one of my sons or daughters, or his, her, or their issue, together with the said estates, tenements, and hereditaments so as aforesaid limited by the will of the said Sir William Gardiner, deceased, as more fully and particularly expressed in the clause or \*proviso in my said will contained, and beginning in the seventh page or sheet thereof:

\*590] And whereas the said Sir John Whalley Smythe Gardiner hath in and by his last will and testament limited several estates, lands, tenements, and hereditaments therein mentioned, at Tackley, in the county of Oxford, and elsewhere, to or in favour of me for life, with remainder to or in favour of my children and their issue in such manner as therein specified; and it being also my will and mind that my said estates, lands, tenements, and hereditaments so as aforesaid in my said will mentioned (and which are situate in the county of Lancaster) shall not be held or enjoyed by any one of my said sons or daughters, or his, her, or their issue, together with the said estates, tenements, and hereditaments so as aforesaid limited by the will of the said Sir John Whalley Smythe Gardiner, deceased, until or before the ultimate remainder or reversion limited in and by my said will shall take place or come into actual possession: I do therefore will and declare that the said clause or proviso so as aforesaid contained in my said will, and beginning at the seventh page thereof, shall be extended and enlarged so as to comprehend the said estates, lands, tenements, and hereditaments so as aforesaid limited by the will of the said Sir John Whalley Smythe Gardiner, as well as those limited by the will of the said Sir William Gardiner; and, for preventing my said estates, lands, tenements, and hereditaments in and by my said will directed to be settled from going with the said estates, lands, tenements, and heredi-

taments so limited by the will of the said Sir John Whalley Smythe Gardiner exactly in the same manner as is provided by the said clause or proviso with respect to the estates, lands, tenements, and hereditaments limited in and by the said will of the said Sir William Gardiner, I do also will and \*declare that such of my said children as [\*591 may happen to be entitled under my said will and this codicil to my said estates, lands, tenements, and hereditaments in my said will directed to be settled, shall be considered as an oldest child, so far as to prevent and for the purpose of preventing such child from being entitled under my said will (in the same manner as is therein provided with respect to my oldest child) to any part of the money to arise from the sale of my copyhold estates therein mentioned, or my personal estate, and also from being entitled to any share or part of the sum of 6000*l.* directed to be raised by the settlement made upon my marriage with my present wife: And I do hereby limit and appoint of and concerning the said 6000*l.* accordingly, and, intending that in all other respects the same shall go and be divided as mentioned in the said settlement, I do hereby will and direct that the sum of 300*l.*, being an annuity secured by the marriage settlement of me and my wife Lady Jane Gardiner to be paid to her during the term of her life, as therein mentioned, shall be increased to the sum of 600*l.*, instead of 400*l.* as in my said will mentioned, and be issuable out of such estates, and be payable at such times, and with such powers to the trustees for my said wife mentioned in the said settlement for the recovery thereof, as in and by the said settlement mentioned and specified as to the said sum of 300*l.* per annum secured to my said wife for her life in and by the said settlement."

Upon the death of Sir James Gardiner the testator, his eldest son, Sir James Gardiner No. 2, entered into the possession of the Gardiner estate as tenant in tail. He also entered into the possession of the Oxfordshire estates held by his father and his uncle, Sir John Whalley Smythe Gardiner, Bart.

In the year 1807, Sir James Gardner No. 2 suffered \*a reco- [\*592 very of the Gardiner estate, and declared the uses to himself in fee: and, on his marriage, in the same year, the Gardiner estate and the Oxfordshire estate were settled by him on his issue. During his life a further recovery was suffered of the Gardiner estate; and his eldest son, James, became the owner thereof and entitled to devise the same.

The plaintiff is in possession of the Gardiner estates, or estates of equivalent value substituted for them. These estates he holds under a devise in his brother's will to him for life, with remainder to his issue in strict settlement.

Robert Whalley, the eldest son of Sir James Gardiner, the testator, by his second wife, Jane Master, on the death of his said father, entered into the possession, by his guardians (he being then an infant), of the Clerk Hill estate; and soon after he attained his majority he filed a bill in the Court of Chancery against his brother, Sir James Gardiner No. 2, and against the trustees under his father's will, and against all other necessary parties then alive,—which bill set out the will and codicil of Sir James Gardiner, the testator, and prayed that it should be declared by the Court that the plaintiff, the said Robert Whalley,

was entitled to an immediate estate for life in the Clerk Hill estate, with remainder to his first and other sons in tail male, and that a conveyance should be executed by the trustees named for that purpose in the will of Sir James Gardiner, the testator.

At the time this bill was filed, Sir James Gardiner No. 2 was married, and had issue of such marriage two daughters, who were parties to the bill; and, pending the suit, he had a son, James Whalley Smythe Gardiner, and thereupon a supplemental bill was filed making him a party to the suit; and the said infant, James \*593] Whalley Smythe Gardiner, by his guardian, \*filed his answer, and submitted his rights to the protection of the Court.

A decree was made in the said cause by the then Master of the Rolls, Sir William Grant, on the 24th of May, 1813, in accordance with the prayer of the petition, declaring "that the plaintiff is entitled to have the estates in the county of Lancaster [the Clerk Hill estate] devised by the will and codicil of Sir James Whalley Smythe Gardiner, settled on him for life, without impeachment of waste save as in the will mentioned, with remainder to his first and other sons in tail male, with such remainders over as are contained in the will of the said testator, Sir James Whalley Smythe Gardiner, with respect to the said estates." And the defendant John Atherton, one of the trustees named in the will of Sir James Gardiner, the testator, declining to accept the trusts of the said will and codicil, his Honour ordered and decreed "that it be referred to one of the Masters to appoint a proper person to be a trustee in the place and stead of the defendant;" and it was ordered "that the said defendants Streynsham Master and Adam Cottam do convey the said estates so as to vest in the defendant William Assheton and such new trustee so to be appointed, and the said Master was to settle such conveyances."

On the 14th of March, 1814, Sir James Gardiner had a second son, now Sir John Brocas Whalley Smythe Gardiner, Bart., the plaintiff in this action.

On the 21st of July, 1814, the trustees under the will of Sir James Gardiner, the testator, by an indenture purporting to be made in pursuance of the said decree, which indenture was properly executed by all necessary parties,—after reciting the will of Sir William Gardiner, and the will and codicil of Sir James Gardiner, the testator, and the \*594] death of \*several parties,—conveyed the Clerk Hill estate as follows:—

"Now this indenture witnesseth, that, in pursuance of and obedience to the said decree or decretal order, and for conveying, settling, and assuring the said moiety of the said manor, and the said capital and other messuages, tenements, lands, grounds, and hereditaments in the said recited will and hereinbefore mentioned and intended to be hereby conveyed unto the said William Assheton and Streynsham Master and their heirs, to the several uses, upon the trusts, and for the intents and purposes, and by, with, and under and subject to the charges, powers, provisoes, conditions, and limitations hereinafter expressly and by reference declared, limited, expressed, and contained of or concerning the same, being or being intended to be the same several uses, trusts, intents, and purposes, charges, powers, provisoes, conditions, declarations, and limitations to, for, upon, under, and

subject to which the same moiety, messuages, lands, tenements, rents, hereditaments, and premises are directed by, or ought to be conveyed or settled in the events which have happened according to, the said will and codicil of Sir James Whalley Smythe Gardiner, deceased, and the said decree or decretal order respectively, and for and in consideration of the sum of 10*s.* of lawful money of Great Britain by the said William Assheton and Streynsham Master unto the said Adam Cottam in hand at or before the sealing and delivery of these presents well and truly paid, the receipt whereof is hereby acknowledged,—the said Adam Cottam, according to his estate and interest, and so far as he can and lawfully may, hath bargained, sold, and released, and by these presents doth bargain, sell, and release unto the said William Assheton, and Streynsham Master and their heirs, in the actual possession of the said \*William Assheton and Streynsham Master now being by virtue of a bargain and sale to [\*595 them thereof made by the said Adam Cottam, for 5*s.* consideration, by indenture bearing date the day next before the day of the date of these presents, for one whole year commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession, All that the said moiety or half-part late of the said Sir James Whalley Smythe Gardiner, deceased, of the manor or lordship or reputed manor or lordship of Whalley aforesaid, with the rights, royalties, franchises, jurisdictions, members, and appurtenances to the same belonging or appertaining; And also all and every the messuages, lands, tenements, hereditaments, and other the real estates whatsoever, situate, being, or arising in the said county palatine of Lancaster, late of the said Sir James Whalley Smythe Gardiner, deceased, which in and by his said last will and testament and codicil, or either of them, were devised unto the said Streynsham Master and Adam Cottam, their heirs and assigns as aforesaid, upon trust to convey the same unto the said William Assheton and John Atherton and their heirs in manner and to the uses in the said will and codicil mentioned, save and except the several parcels of land and hereditaments, part of the said real estates of the said Sir James Whalley Smythe Gardiner, deceased, which are mentioned and comprised in the schedule hereunder written or hereunto annexed, the fee simple and inheritance of which the said Sir James Whalley Smythe Gardiner after the execution of his said will and codicil contracted and agreed to sell and convey as aforesaid, Together with all and singular the rights, members, and appurtenances to the said messuages, lands, tenements, and \*hereditaments (except as before excepted) belonging or in any [\*596 wise appertaining, or deemed or reputed to belong or appertain thereto; And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits, of the said moiety, messuages, lands, tenements, hereditaments, and real estate (except as before excepted); And all the estate, right, title, and interest of the said Adam Cottam, of, in, to, or out of the said hereditaments and real estate, and every or any part thereof (except as hereinbefore excepted), under and by virtue of the said will and codicil of the said Sir James Whalley Smythe Gardiner, deceased, and the said deed-poll or instrument in writing of the 19th of July instant, or

any of them: To have and to hold the said moiety, messuages, lands, tenements, hereditaments, and all other the real estates and premises hereby released, or mentioned or intended so to be, with their and every of their rights, royalties, members, and appurtenances (subject, as to all such of the said hereditaments and premises as were charged with the debts and funeral and testamentary expenses of the said Sir James Whalley Smythe Gardiner, deceased, in aid of his personal estate, or with the said annual or other sums of money for and in addition to the jointure of the said Dame Jane Gardiner, his widow, and for the portions of his younger children, by virtue of his marriage settlement, will, and codicil respectively as aforesaid, to such of the said charges as are now subsisting and do affect the same hereditaments respectively), unto the said William Assheton and Streynsham Master, their heirs and assigns for ever; nevertheless, to the several uses, upon the trusts, for the intents and purposes, and by, with, under, and subject to the several powers, provisoes, and limitations over hereinafter expressly and by reference limited, mentioned, declared, and contained of and concerning

\*597] the same, that is to say, To the use of the said Robert Whalley and his assigns for and during the term of his natural life, without impeachment of or for any manner of waste (save and except as to felling or cutting down timber or wood, which is only to be cut down or fallen under and in pursuance of the power or proviso for that purpose hereinafter contained); [remainder to the trustees to preserve contingent remainders]: And, after the decease of the said Robert Whalley, to the use of the first son of the body of the said Robert Whalley lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use of the second son of the body of the said Robert Whalley lawfully to be begotten, and of the heirs male of the body of such second son lawfully issuing; and, for default of such issue, to the use of the third, fourth, fifth, sixth, and of all and every other the son and sons of the body of the said Robert Whalley lawfully to be begotten, severally, successively, and in remainder one after another, as they and every of them shall happen to be in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body issuing being preferred and to take before the younger of the same sons and the heirs male of his and their body and bodies issuing: And, for default of such issue, to, for, upon, and according to such other uses, limitations, trusts, intents, and purposes in and by the said will and codicil of the said Sir James Whalley Smythe Gardiner, deceased, directed, declared, expressed, or contained of or concerning the said hereditaments and premises intended to be hereby released, posterior to, or to take effect in remainder or reversion after, the uses hereby limited or directed to be limited to the

\*598] said Robert Whalley and to his first and other sons successively in tail male as aforesaid, as in the events which have happened are now subsisting undetermined or capable of taking effect, in the order and course, manner, and form directed by, and according to the true intent and meaning of, the said will and codicil: Nevertheless, as well in regard to the uses and estates hereinbefore limited

expressly unto and in trust for the said Robert Whalley during his life, and unto his first and other sons successively in tail male, as to all such ulterior uses and estates so hereinbefore limited by reference, the same are so limited with, under, and subject to such of the charges, powers, privileges, provisos, restrictions, conditions, declarations, or limitations directed, declared, expressed, or contained in and by the said will and codicil of the said Sir James Whalley Smythe Gardiner, deceased, concerning the said hereditaments and premises, as are, and so far only and in such manner as the same are, in the events which have happened, now subsisting undetermined or capable of taking effect or of being executed according to the true intent and meaning of the said will and codicil: Provided also, and it is hereby likewise declared to be the true intent and meaning of these presents and of the parties hereto, that, for the more effectually declaring the uses of this conveyance as to such of the persons who, in the events which have happened or may hereafter happen, are or may become entitled to the said hereditaments and premises intended to be hereby released, by virtue of these presents, and to whom the said hereditaments and estates are by the said will and codicil of the said Sir James Whalley Smythe Gardiner, deceased, directed to be limited for estates in tail male, the same shall be to the several uses of such persons respectively, and the heirs male of their respective bodies, in the order \*and [\*599 course of limitations directed by the said will and codicil; and that, in like manner, for the more effectually declaring the uses of this conveyance as to such of the persons who, in the events which have happened or may hereafter happen, are or may become entitled to the said hereditaments and premises intended to be hereby released, by virtue of these presents, and to whom the said hereditaments and estates are by the said will and codicil directed to be limited for estates in tail general, the same shall be to the several uses of such persons respectively, and the heirs of their respective bodies, in the order and course of limitation directed by the said will and codicil."

The said James Whalley Smythe Gardiner, eldest son of Sir James Gardiner No. 2, died without having been married, on the 11th of October, 1837.

Sir James Gardiner No. 2 died on the 22d of October, 1851; and, on his death, the plaintiff succeeded to the baronetcy.

The said Robert Whalley continued in possession of the Clerk Hill estate until his death, in November, 1841.

William Whalley, the fourth son of Sir James Gardiner, the testator, and tenant in tail male in remainder under his father's will, died without leaving issue, on the 10th of March, 1860, and without having done anything to bar the entail to the Clerk Hill estate.

On the death of Robert Whalley without leaving issue, his brother, the Rev. John Master Whalley, entered into the possession of the Clerk Hill estate, and continued in possession of the same until his death, on the 28th of October, 1861.

On the death of the Rev. John Master Whalley, who died without leaving issue, Mrs. Jellicoe, the defendant, his eldest sister, entered into possession of the Clerk Hill estate, and has continued in possession until the present time.

\*600] \*The following admissions for the purposes of the cause were agreed between the attorneys for the respective parties:—

1. That the pedigree, ante, page 572, is correct.
2. That, at the time of making his will, and at his death, Sir James Whalley Smythe Gardiner, Bart. (No. 1), was seised in fee simple in possession of the Clerk Hill estate, in the county of Lancaster, the subject of the present action; and that the defendant for the purposes of this action is now in possession of the same estate.
3. The marriage of the said James Whalley, who afterwards assumed the additional surnames of Smythe and Gardiner, and became Sir James Whalley Smythe Gardiner, Bart. (No. 1), first, on the 28th of October, 1784, to Elizabeth Assheton; the death of the said Elizabeth on the 8th of September, 1785; and the marriage of Sir James Whalley Smythe Gardiner (No. 1), then James Whalley, secondly, on the 3d of December, 1789, to Jane Master; and that he was only married to the said Elizabeth and Jane.
4. The due execution so as to pass freehold estates of the last will and testament of the said James Whalley, bearing date the 2d of July, 1796.
5. The due execution so as to pass freehold estates of a codicil, to the will of the said James Whalley, then called Sir James Whalley Smythe Gardiner, Bart., bearing date the 7th of February, 1799.
6. The death of Sir James Whalley Smythe Gardiner (No. 1), on the 21st of August, 1805.
7. An examined copy of his will of July 2d, 1796, and an examined copy of the codicil to the same, of the 7th of February, 1799, such examined copies signed by the plaintiff's and defendant's attorneys as admitted.
- \*601] 8. The birth of James Whalley, afterwards Sir \*James Whalley Smythe Gardiner, Bart. (No. 2), the only child of Sir James Whalley Smythe Gardiner (No. 1), by Elizabeth, his first wife; the birth of Robert Whalley (in 1790), of John Master Whalley (in 1798), of William Whalley (in 1796), and of Thomas Whalley (in 1797), the only sons of Sir James Whalley Smythe Gardiner (No. 1), by Jane, his second wife; and, in the year 1792, of Elizabeth Jane, the defendant, his eldest daughter by the said Jane, his second wife, who was married to and is now the widow of Samuel Jellicoe.
9. The birth of James Streynsham Whalley, the only son and only child of John Master Whalley, on the 7th of December, 1840.
10. The deaths of Robert Whalley in 1841, John Master Whalley on the 29th of October, 1861, William Whalley on the 10th of March, 1860, and Thomas Whalley in 1800, and James Streynsham Whalley on the 11th of September, 1845, respectively, without leaving issue.
11. The marriage of Sir James Whalley Smythe Gardiner (No. 2) with Frances Mosley on the 14th of August, 1807.
12. The due execution by Sir James Whalley Smythe Gardiner (No. 2) and Robert Whalley of indentures of lease and release, the release bearing date the 11th of December, 1811, and made between Sir James Whalley Smythe Gardiner (No. 2), eldest son and heir of Sir James Whalley Smythe Gardiner, Bart. (No. 1), deceased (formerly James Whalley, Esq.), of the first part, Robert Whalley, Esq., the second son of the said Sir James Whalley Smythe Gardiner, deceased,

of the second part, the Rev. Streynsham Master and Adam Cottam of the third part, and Thomas William Whalley, Esq., the said Streynsham Master, and John Atherton, Esq., of the fourth part.

\*13. A decree of the Court of Chancery bearing date the 24th of May, 1813, and made in a suit wherein Robert Whalley was plaintiff, and Streynsham Master, Adam Cottam, and Sir James Whalley Smythe Gardiner, Frances Elizabeth Whalley Gardiner, Barbara Whalley Smythe Gardiner, Elizabeth Jane Whalley, Barbara Smythe Whalley, John Master Whalley, Grace Whalley, William Whalley, and Caroline Whalley Gardiner, and William Assheton, and John Atherton, were defendants; and in another suit wherein Robert Whalley was plaintiff, and James Whalley Smythe Gardiner, an infant, by his next friend, was defendant.

14. The due execution of a deed-poll of the 19th of July, 1814, under the hand and seal of the Rev. Streynsham Master.

15. The due execution by all parties of indentures of lease and release and settlement of July 20th and 21st, 1814, made in pursuance of the said decree in Chancery of the 24th of May, 1813, between Adam Cottam of the one part, and William Assheton and Streynsham Master of the other part.

16. The births of James Whalley Smythe Gardiner, Esq., hereinafter referred to as (No. 3), the first son of Sir James Whalley Smythe Gardiner (No. 2), on the 5th of September, 1812, and of Sir John Brocas Whalley Smythe Gardiner (the plaintiff), the second son, on the 18th of March, 1814.

17. The death of Sir James Whalley Smythe Gardiner (No. 3) on the 11th of October, 1837, without issue.

18. The death of Sir James Whalley Smythe Gardiner (No. 2), on the 22d of October, 1851.

19. The possession by John Master Whalley at the date of his death as tenant for life of the Clerk Hill estate.

\*20. That, at the time of making his will and at his death, Sir William Gardiner, Bart., was seised in fee simple in possession of the manor of North Fareham, or Roche Court, of the mansion called Roche Court, and of divers freehold messuages, lands, and hereditaments in the several parishes of Fareham and Wickham, in the county of Southampton, containing altogether 499 acres or thereabouts, and was also seised or entitled for a customary estate in fee simple according to the custom of the manor of Fareham of or to divers copyhold lands in the said parish of Fareham, containing 102 acres or thereabouts (such copyhold lands having been duly surrendered by him to the use of his will on the 16th of October, 1740), and which manor, mansion-house, and freehold and copyhold hereditaments are hereinafter called by way of distinction "The Roche Court estate;" and was also seised in fee simple of a freehold estate situate near the town of Basingstoke, in the county of Southampton, and consisting of the manor or reputed manor of Sherbourne St. John, and various freehold messuages and lands comprising altogether 480 acres or thereabouts, situate in the several parishes of Sherbourne St. John, Bramley, and Bamber, in the said county of Southampton, and which said last-mentioned manor and hereditaments are hereinafter called, by way of distinction, "The Basingstoke estate," and of a yearly rent

or rent-charge of 20s. issuing out of a messuage and lands in the parish of Tichfield, in the same county.

21. That, save as aforesaid, the said Sir William Gardiner was not seised, either at the date of his will or of his death, of any real estate.

22. The due execution so as to pass freehold estate of the last will and testament of Sir William Gardiner, bearing date the 20th of January, 1778, and stamped copy under the seal of the Probate Court.

\*604] \*23. The death of the said Sir William Gardiner in 1779, without leaving issue.

24. Possession by Sir John Whalley Smythe Gardiner, Bart., until his death, of the Roche Court and Basingstoke estates devised by the will of Sir William Gardiner.

25. That the said Sir John Whalley Smythe Gardiner was before and at the date and execution of the indentures next hereinafter mentioned seised in possession, partly as tenant in tail and partly as tenant in fee simple, of the manor of Hill Court, of divers messuages, lands, and hereditaments in the parish of Tackley, in the county of Oxford (hereinafter called the Tackley Park estate), as well as of other hereditaments in the said county sold shortly after his death, as hereinafter admitted, for payment of his debts.

26. The due execution by all the parties of indentures of lease and release of the 2d and 3d of July, 1787, being the settlement made on the marriage of Sir John Whalley Smythe Gardiner with Martha Newcome, spinster.

27. That, subsequent to the date of the last indentures, and previously to the 13th of April, 1795, the said Sir John Whalley Smythe Gardiner purchased for the sums of 645*l.*, 700*l.*, and 1600*l.*, respectively, two farms situate in the parish of Tackley, in the county of Oxford, one of such farms comprising a messuage, garden, and appurtenances, and 31*ac.* 1*r.* of land, or thereabouts, and the other of such farms comprising a messuage, cottage, and 30 acres of land, or thereabouts, and a third farm situate in the parish of Cuddesden, comprising 42 acres of land, or thereabouts,—all which farms previous to the date aforesaid were conveyed to him, his heirs and assigns for ever.

\*605] These three farms, for the purposes of this \*action, are hereinafter called "Mills," "Castells," and "Jemmetts."

28. That the said Sir John Whalley Smythe Gardiner, at the time of making his will, and at his death, was seised in fee simple in possession of the farms called Mills, Castells, and Jemmetts, and was also seised of the reversion in fee simple expectant on his own death of all the hereditaments comprised in the settlement of the 3d of July, 1787.

29. That, save as aforesaid, the said Sir John Whalley Smythe Gardiner was not at the date of his death seised of any real estate.

30. The due execution so as to pass freehold estate of the last will and testament of Sir John Whalley Smythe Gardiner, bearing date the 13th of April, 1795.

31. The due execution by all parties of an indenture of the 12th of May, 1796, between Sir John Whalley Smythe Gardiner, Bart.

and Dame Martha his wife, of the one part, and George Gostling and Henry Newcome, Esq., of the other part.

32. Indentures of fine sur conuzance de droit come ceo, &c., with proclamations, between George Gostling and Henry Newcome, plaintiffs, and Sir John Whalley Smythe Gardiner and Martha his wife, deforcianta, of sixteen messuages, fourteen cottages, two mills, 1300 acres of land, 400 acres of meadow, 600 acres of pasture, 200 acres of wood, 100 acres of furze and heath, and common of pasture for all cattle, with the appurtenances, in the parishes of Tackley and Cuddesden, and in Denton; and that the parts of the hereditaments comprised therein were subsequently mortgaged by the said Sir John Whalley Smythe Gardiner, for securing sums of 1200*l.* and 600*l.*

33. The death of Sir John Whalley Smythe Gardiner, without issue, leaving the said James Whalley, \*afterwards Sir James Whalley Smythe Gardiner (No. 1), his brother and heir at law. [\*606]

34. That thereupon Dame Martha Whalley Smythe Gardiner, widow of Sir John Whalley Smythe Gardiner, entered into possession of the lands expressed to be devised to her for her life by his will, situate in the parish of Tackley, but not including any portion of the farms called "Mills," "Castells," and "Jemmetts."

35. That all the hereditaments of which the said Sir John Whalley Smythe Gardiner died seised (except the said hereditaments in the parishes of Tackley and Cuddesden and Milton, and in Wheatley, Denton, and Nethercott), were sold shortly after his death by William Henry Ashhurst, the executor and trustee named in his will, for payment of his debts, including the said mortgage-debts of 1200*l.* and 600*l.*, and which were duly discharged.

36. That the said Sir James Whalley Smythe Gardiner (No. 1), on the death of the said Sir John Whalley Smythe Gardiner, entered into possession of the Roche Court and Basingstoke estates and the Tackley Park estate (except the part in the possession of Dame Martha Whalley Smythe Gardiner), and also entered into possession of the farms called Mills, Castells, and Jemmetts, and continued in possession thereof until his death.

37. That, on the death of the said Sir James Whalley Smythe Gardiner (No. 1), Sir James Whalley Smythe Gardiner, Bart. (No. 2), his eldest son and heir at law, entered into possession of the Roche Court and Basingstoke estates, and the Tackley Park estate (except the part thereof in the possession of Dame Martha Whalley Smythe Gardiner), and also entered into possession of the farms called Mills, Castells, and Jemmetts.

38. The admission of Sir James Whalley Smythe \*Gardiner (No. 2), at a Court duly held for the manor of Fareham on the 3d of December, 1803, on surrender of Stephen Barney, Esq., heir of the surviving devisee in trust under the will of Sir William Gardiner, to the copyhold portions of the Roche Court estate. [\*607]

39. At the same Court, a recovery duly had and suffered, and the readmission of Sir James Whalley Smythe Gardiner (No. 2), to hold to him and his heirs according to the custom of the manor.

40. The due execution by all parties of an indenture of bargain and sale bearing date the 20th of January, 1807, and made between the said Sir James Whalley Smythe Gardiner (No. 2), therein de-

scribed as tenant in tail in possession under and by virtue of the last will and testament of Sir William Gardiner, late of Roche Court aforesaid, Bart., deceased, of the first part, John Lee, gentleman, of the second part, and Pierce Walsh, gentleman, of the third part.

41. That the Basingstoke estate and the freehold portions of the Roche Court estate were comprised in the description of the hereditaments bargained and sold by the last-mentioned deed.

42. Exemplification of recovery wherein Pierce Walsh was demandant, John Lee, tenant, and Sir James Whalley Smythe Gardiner (No. 2) was vouchee, of the manor of North Fareham, otherwise Roche Court, with the appurtenances, and 16 messuages, 16 gardens, 1000 acres of land, 170 acres of meadow, 170 acres of pasture, and 160 acres of wood, and the rents of 20s., 20s., 4l., 4l., and 4l., with common of pasture, &c., with the appurtenances, in North Fareham, South Fareham, Wickham, Titchfield, Sherbourne St. John, otherwise East Sherbourne, Bramley, and Bamber.

\*608] 43. The due execution by all parties of an indenture of bargain and sale made between Sir James Whalley Smythe Gardiner (No. 2), of the first part, John Lee of the second part, and Pierce Walsh of the third part.

44. Exemplification of recovery wherein Pierce Walsh was demandant, John Lee tenant, and Sir James Whalley Smythe Gardiner (No. 2) was vouchee, of the manor of Hill Court, with the appurtenances, and 45 messuages, one mill, forty gardens, 1600 acres of land, 400 acres of meadow, 600 acres of pasture, 100 acres of wood, 180 acres of furze and heath, common of pasture for all manner of cattle, free fishing, and free warren, with the appurtenances, in the parishes of Cuddesden, Tackley, and Milton, and in Wheatley, Denton, and Nethercott.

45. The due execution of indentures of lease and release of the 30th and 31st of July, 1807, the release made between the said Sir James Whalley Smythe Gardiner (No. 2), the eldest son and heir at law of the testator Sir James Whalley Smythe Gardiner (No. 1), of the first part, Frances Mosley, spinster, of the second part, George Smith, Esq., and Frances Maria his wife of the third part, Thomas Lister Parker and the Rev. Streynsham Master, clerk, of the fourth part, Sir Oswald Mosley, Bart., and the Rev. John Peploe Mosley, clerk, of the fifth part, and William Assheton, Esq., and the said George Smith, of the sixth part, being a settlement made on the marriage of the said Sir James Whalley Smythe Gardiner (No. 2) and Frances Mosley.

46. That the Tackley Park estate and the farms called Mills, Castells, and Jemmetts, the Basingstoke estate, and the freehold and copyhold portions of the Roche Court estate, were comprised in the description of the hereditaments respectively granted and released and covenanted to be surrendered in and by the last-mentioned indenture of settlement.

\*609] 47. That, by the award made in pursuance of an Act passed in the 45 G. 3 (c. 28), for enclosing land in the parish of Fareham, in the county of Southampton, a piece of land containing 22a. 0r. 15p. was set out, allotted, and awarded to the said Sir James Whal-

ley Smythe Gardiner (No. 2), in respect of the said Roche Court estate.

48. The sale by Sir James Whalley Smythe Gardiner (No. 2) and the trustees of his marriage settlement shortly after the date of that settlement, and under the powers therein contained, of the whole of the Basingstoke estate to various persons for sums amounting in the whole to 13,185*l.*, and the conveyance in fee simple in or prior to the year 1809 to the respective purchasers of the several portions of the said estate so sold.

49. The investment by the trustees of the said settlement of the clear proceeds of such sale in the purchase of divers freehold and copyhold hereditaments in the parish of Fareham, comprising altogether about 50 acres of freehold land and 150 acres of copyhold land, and the conveyance of the freehold portions thereof in the year 1810 to the uses of the said settlement of the 31st day of July, 1807, and the surrender to and admission of the said trustees to the copyhold portions of the said hereditaments so purchased by them, upon trusts corresponding with the uses of the said settlement.

50. The sale by Sir James Whalley Smythe Gardiner (No. 2) and the trustees of the said settlement, and under the powers therein contained, in the year 1811, for the sum of 32,828*l.*, of part of the hereditaments in the parish of Tackley aforesaid to John Stratton, Esq., and the conveyance in that year to him and his heirs in fee simple of the said hereditaments so sold, of which sum 1500*l.* was laid out in the \*trustees' names in the purchase of 2500*l.* Consolidated 3 per Centum Annuities, and 30,072*l.*, the clear surplus after [\*610 payment of costs, was paid over to Sir James Whalley Smythe Gardiner (No. 2) by the trustees, or was with their privy received by the said Sir James Whalley Smythe Gardiner (No. 2) instead of being invested according to the trusts of the said settlement.

51. The sales in the year 1813 by Sir James Whalley Smythe Gardiner (No. 2) and the trustees of the said settlement, and under the powers therein contained, of divers portions of the said hereditaments at Wheatley, within the parish of Cuddesden, and completion in the year 1821 of several of such sales for sums amounting altogether to 1800*l.*, which sums were not reinvested by the said trustees according to the trusts of the said settlement.

52. The due execution by Sir James Whalley Smythe Gardiner (No. 2) and his eldest son, James Whalley Smythe Gardiner (No. 3), of an indenture bearing date the 26th of June, 1834, and made between James Whalley Smith Gardiner (No. 3) of the first part, the said Sir James Whalley Smith Gardiner (No. 2) of the second part, Dame Martha Gardiner of the third part, and Henry Denton of the fourth part.

53. The due enrolment thereof in the Court of Chancery on the 28th of August, 1834, pursuant to the Fines and Recoveries Abolition Act, 3 & 4 W. 4, c. 74.

54. The admission, at a Court duly held for the manor of Fareham, of the said Thomas Lister Parker and Streynsham Master, on the surrender of the said Sir James Whalley Smythe Gardiner (No. 2), to the copyhold premises to which he was admitted on the 3d of December, 1806.

\*611] 55. The due execution by Sir James Whalley \*Smythe Gardiner (No. 2) and James Whalley Smythe Gardiner (No. 3) of an indenture bearing date the 26th of June, 1834, and made between the said Sir James Whalley Smith Gardiner (No. 2) of the first part, James Whalley Smith Gardiner (No. 3) of the second part, and Henry Denton of the third part.

56. The due enrolment of the last-mentioned indenture on the 7th of August, 1834, on the Court-rolls of the manor of Fareham, pursuant to the Fines and Recoveries Abolition Act.

57. The due execution by Sir James Whalley Smythe Gardiner (No. 2) of indentures of lease and release bearing date respectively the 25th and 26th of June, 1834, and made between Sir James Whalley Smythe Gardiner (No. 2) of the one part, and James Whalley Smythe Gardiner (No. 3) of the other part, being a mortgage for 20,000*l*.

58. The due execution by the said James Whalley Smythe Gardiner (No. 3) of indentures of lease and release bearing date respectively the 13th and 14th of July, 1834,—the release being endorsed upon the last-mentioned indenture of the 26th of June, 1834, and being made between the said James Whalley Smythe Gardiner (No. 3) of the first part, Henry Eyres Landor and George Kinderley of the second part, and Henry Denton of the third part; being an assignment of the last-mentioned mortgage to the said Henry Denton, in trust.

59. The due execution by the said James Whalley Smythe Gardiner (No. 3) of an indenture, also endorsed upon the said last-mentioned indenture of the 26th of June, 1834, and made between the said James Whalley Smythe Gardiner of the first part, the said Henry Denton of the second part, and Henry Eyres Landor and George Kinderley of the third part, and Sir James Whalley Smythe Gardiner of the fourth \*612] part, whereby \*the said mortgage of 20,000*l*. was reduced to the principal sum of 14,000*l*.

60. The due execution by Sir James Whalley Smythe Gardiner (No. 2) of indentures of lease and release respectively made between the said Sir James Whalley Smythe Gardiner (No. 2) of the one part, and the said Thomas Lister Parker and Streynsham Master of the other part,—being a mortgage for the sum of 30,072*l*. due to the said Thomas Lister Parker and Streynsham Master, as before stated.

61. The due execution by the said James Whalley Smythe Gardiner (No. 3) of an indenture bearing date the 14th of July, 1834, and made between the said James Whalley Smythe Gardiner (No. 3) of the first part, Frances Elizabeth Whalley Smythe Gardiner, Barbara Whalley Smythe Gardiner, and the plaintiff, of the second part, and Henry Eyres Landor and George Kinderley of the third part, being a mortgage by James Whalley Smythe Gardiner (No. 3) of his reversion in fee for 40,000*l*.

62. The due execution by the said James Whalley Smythe Gardiner (No. 3) of an indenture bearing date the 14th of January, 1835, and made between the same parties as the last-mentioned indenture; being a further charge of 2000*l*.

63. That, by two several indentures bearing date respectively the 25th of March, 1835, and the 1st of February, 1837, and respectively

made between the said James Whalley Smythe Gardiner (No. 3) of the first part, the said Sir James Whalley Smythe Gardiner (No. 2) of the second part, the said Dame Martha Gardiner of the third part, William Henry Ashhurst and George Kinderley of the fourth part, Barnard Hale of the fifth part, Henry Denton of the sixth part, Henry Eyres Landor and George Kinderley of the seventh part, George Herbert Kinderley of the \*eighth part, and George Edward Cottrell [\*613 of the ninth part,—the latter of such deeds being duly enrolled on the 20th of February, 1887, in pursuance of the 3 & 4 W. 4, c. 74,—the estate in tail male in reversion of which the said James Whalley Smythe Gardiner (No. 3) was seised or entitled to, such of the said hereditaments at Tackley as were in the possession of Dame Martha Gardiner as hereinbefore admitted, and all limitations over, were barred and destroyed, and the same hereditaments were, subject to the life estates of the said Dame Martha Gardiner and of Sir James Whalley Smythe Gardiner (No. 2), conveyed and limited to the use of the said James Whalley Smythe Gardiner (No. 3) and his heirs, in fee simple.

64. The due execution by the said James Whalley Smythe Gardiner (No. 3) of an indenture bearing date the 31st of July, 1835, and made between the said James Whalley Smythe Gardiner (No. 3) of the one part, and William Henry Ashhurst and George Kinderley of the other part; being a mortgage of the said reversion for 6867*l.* 18*s.* 7*d.* and interest.

65. The due execution by the said James Whalley Smythe Gardiner (No. 3) of an indenture bearing date the 27th of December, 1836, and made between the said James Whalley Smythe Gardiner (No. 3) of the one part, and Sir William Domville, Bart., of the other part, being a mortgage by the said James Whalley Smythe Gardiner (No. 3) of his said reversion for the sum of 1500*l.* and interest; and that, out of the several sums amounting to 50,367*l.* 18*s.* 7*d.* raised by mortgage as aforesaid, 19,151*l.* 7*s.* 7*d.* or thereabouts was applied in taking up charges and encumbrances created by Sir James Whalley Smythe Gardiner (No. 2) on the tithes and on the 70 acres of freehold and 235 acres of copyhold land mentioned in admission No. 66; and that such charges and encumbrances \*were transferred to trustees [\*614 for the benefit of James Whalley Smythe Gardiner (No. 3).

66. That, shortly after the date of the said indentures of mortgage of the 25th and 26th of June, 1834, the said James Whalley Smythe Gardiner (No. 3) entered into possession as mortgagee for the life of his father the said Sir James Whalley Smythe Gardiner (No. 2) of all the hereditaments then unsold of which the said Sir James Whalley Smythe Gardiner (No. 2) was then tenant for life under the limitations contained in the settlement of the 31st of July, 1807, as also of Mills, Castells, and Jemmetts, and also entered into possession as mortgagee of certain freehold tithes held for three lives, and of certain other lands and hereditaments in the parish of Fareham, comprising about 70 acres of freehold and 235 acres of copyhold land of which the said Sir James Whalley Smythe Gardiner (No. 2) was owner in fee-simple, and which tithes and lands were purchased by him in or previously to the year 1811, as to the tithes, for 8740*l.* and, as to the lands, for sums amounting in the aggregate to 15,460*l.* or thereabouts, and were

comprised in the said last-mentioned indentures of mortgage, and continued in such possession as mortgagee until his death.

67. That, at the time of making his will, and at his death, the said James Whalley Smythe Gardiner (No. 3) was seised or entitled to the reversion expectant on the death of his father Sir James Whalley Smythe Gardiner (No. 2), and subject to then existing mortgages for the sums of 40,000*l.*, 2000*l.*, 6867*l.* 18*s.* 7*d.*, and 1500*l.* (making together the total principal sum of 50,367*l.* 18*s.* 7*d.*) of and in the Roche Court estate, and also of and in so much of the Tackley Park estate as had not been sold as hereinbefore admitted, and of and in the farms called Mills, Castells, and Jemmetts, and also of and in the freehold \*615] and copyhold \*hereditaments in the parish of Fareham so purchased and settled in the year 1810 as hereinbefore admitted; and was also absolutely entitled in reversion to the said sums of 30,072*l.* sterling, and 3200*l.* consols, and 1800*l.* sterling, and would have been entitled in reversion as aforesaid to any hereditaments which ought to have been purchased therewith, according to the trusts of the said settlement of the 31st of July, 1807.

68. The due execution so as to pass freehold estate of the last will and testament of the said James Whalley Smythe Gardiner (No. 3), bearing date the 1st of February, 1837.

69. The due execution so as to pass freehold estate of a codicil to the will of the said James Whalley Smythe Gardiner (No. 3), bearing date the 10th of February, 1837.

70. The death of Dame Martha Gardiner on the 19th of July, 1840.

71. The letters of administration with the said will and codicil of the said James Whalley Smythe Gardiner (No. 3), granted by the Prerogative Court of the Archbishop of Canterbury to the plaintiff Sir John Brocas Whalley Smythe Gardiner.

72. The sale in the year 1842 by the trustees of the said settlement of the 31st of July, 1807, of the said 2500*l.* Consols, and payment of the proceeds of such sale to the administrator of the said James Whalley Smythe Gardiner (No. 3).

73. The sale by the trustees of the will of the said James Whalley Smythe Gardiner (No. 3), in the year 1846, of the farms called Mills and Castells, as well as the remaining portion of so much of the Tackley Park estate as was situate in the parish of Tackley, to William Evetts, Esq., and the conveyance in that year to him and his heirs in fee simple of the hereditaments so sold to him.

\*616] \*74. The sale by the trustees of the will of the said James Whalley Smythe Gardiner (No. 3), in or previously to the year 1852, to various persons, of the remaining unsold portions of the Tackley Park estate (including a piece of land containing four acres or thereabouts, being all the land situate in the parish of Milton of which Sir John Whalley Smythe Gardiner died seised), and of the farm called Jemmetts, and the conveyance, in or previously to the year 1852, to the respective purchasers, in fee simple, of the several portions of the said hereditaments so sold.

75. The sales by the trustees of the will of the said James Whalley Smythe Gardiner (No. 3) of portions of the Roche Court estate, in the parish of Fareham, that is to say, in or previously to the year 1844 of 10*a.* 2*r.* 9*p.* or thereabouts to the South Western Railroad Com-

pany, and in the year 1846 of 1*a.* 3*r.* 25*p.* to William Thresher, Esq., for sums amounting together to 847*l.* or thereabouts, and the conveyance, in or previously to the year 1846, in fee simple, to the respective purchasers of the several portions of the said hereditaments so sold.

76. That, on the death of the said Sir James Whalley Smythe Gardiner (No. 2) on the 22d of October, 1851, the plaintiff, Sir John Brocas Whalley Smythe Gardiner became seised or entitled, under the will of James Whalley Smythe Gardiner (No. 3), as tenant for his life (but subject to the term of 1000 years thereby limited to trustees, and to the trusts thereof), of or to such portion of the hereditaments devised by the said will as then remained unsold.

77. That the administrator with the will annexed of the said James Whalley Smythe Gardiner (No. 3) has from time to time got in some part of his personal estate (not including any part of the said sums of 30,072*l.* and 1800*l.*); and that he and the trustees of \*the said [617 will thereout and out of the proceeds of the aforesaid sales so effected by the said trustees, have paid the testator's funeral and testamentary expenses and such of his debts as have come to their knowledge, including the said mortgage-debts of 40,000*l.*, 2000*l.*, 6867*l.* 18*s.* 7*d.*, and 1500*l.*; and that the said trustees have, previously to the year 1851, invested 3443*l.* sterling, further part of the moneys coming to their hands by virtue of such sales, in the purchase of freehold and copyhold lands and hereditaments in the parish of Fareham aforesaid, and have caused the freehold portions thereof to be settled to the uses by the will of the said James Whalley Smythe Gardiner (No. 3) declared of the freehold estates thereby devised, and now hold the copyhold portions thereof upon trusts corresponding with such uses; and that the said trustees have from time to time effected renewals of a lease of tithe rent-charges at Fareham held for lives, of which the said James Whalley Smythe Gardiner (No. 3) died possessed or entitled, as mortgagee or otherwise, and have laid out in such renewals the total sum of 1162*l.*; and the said trustees have also invested the surplus proceeds of such sales in the sum of 2537*l.* Consolidated Bank Annuities.

78. The sale by the trustees of the will of the said James Whalley Smythe Gardiner (No. 3) of the beforementioned allotment in Fareham parish, containing 22*a.* 0*r.* 15*p.*, to William Cawte, the receipt of the purchase-money on or before the 4th of October, 1861, the due execution of the deed of conveyance to the said William Cawte and his heirs by the said plaintiff, Sir John Brocas Whalley Smythe Gardiner, and by William Henry Domville, Esq., one of the trustees, on the 15th of October, 1861, and the execution by Captain Donald M'Leod Mackenzie, the other trustee, before the month of February, 1862.

\*79. A contract bearing date the 9th of July, 1861, signed by the plaintiff, Sir John Brocas Whalley Smythe Gardiner, [618 on behalf of himself and the trustees of the will of the said James Whalley Smythe Gardiner (No. 3), for the sale to William Houghton of 22*a.* 1*r.* 10*p.* of land (being the whole of the hereditaments situate in the parish of Wickham which were comprised in the said settlement of the 31st of July, 1807).

80. That the purchase-moneys for the hereditaments so sold to the said William Cawte and William Houghton have been received by the trustees of the will of James Whalley Smythe Gardiner (No. 3), and have been invested by the said trustees, pursuant to the trusts of the said will, in the purchase of other hereditaments in the parish of Fareham.

81. That the plaintiff, Sir John Brocas Whalley Smythe Gardiner, as tenant for life under the said will of the said James Whalley Smythe Gardiner (No. 3) (subject as aforesaid), was previously to and at the date of the death of the said John Master Whalley on the 27th of October, 1861, in possession or in receipt of the rents and profits of so much of the freehold and copyhold hereditaments devised by the will of the said James Whalley Smythe Gardiner (No. 3), situate in the parishes of Fareham and Wickham, in the county of Southampton, as had not then been sold and conveyed away as above stated, and is still in possession of all the same hereditaments except those sold as above stated to William Cawte, and those agreed to be sold, and which have since been conveyed to or by the direction of the said William Houghton; and is also in possession of divers pieces or parcels of land in the parish of Fareham which have been purchased as above stated with moneys held by the trustees of the \*619] will of the said James Whalley \*Smythe Gardiner (No. 3), upon trust to be laid out in the purchase of real estate, and which purchased lands have been conveyed to the uses declared by his will of the hereditaments of which the said James Whalley Smythe Gardiner (No. 3) died seised; and that the said hereditaments of which the said Sir John Brocas Whalley Smythe Gardiner is possessed under the said will of the said James Whalley Smythe Gardiner (No. 3) were on the said 27th of October, 1861, and now are, freed and discharged from all charges and encumbrances (by reason of the trustees of the said will having selected for sale the estates in the county of Oxford for the purpose of discharging all such charges and encumbrances, as before admitted), save and except three annuities of 50*l*. each now payable respectively to Barbara Whalley Smythe Brown, widow (formerly Barbara Whalley Smythe Gardiner), Grace Emily Whalley Smythe Gardiner, and Mary Anna Whalley Smythe, the wife of Montague Burrows, Esq. (formerly Mary Anna Whalley Smythe Gardiner), for their respective lives, under the said will of the said James Whalley Smythe Gardiner (No. 3), and severally secured to the said annuitants under the term of one thousand years limited by the said will; and that the several other annuitants named in the said will and codicil thereto died previously to the said 27th of October, 1861.

82. That, save as aforesaid, the plaintiff, Sir John Brocas Whalley Smythe Gardiner, is not now in possession or entitled to the rents and profits of any of the hereditaments comprised in the said settlement of the 31st of July, 1807.

83. That the plaintiff, Sir John Brocas Whalley Smythe Gardiner, is, under the said will of the said James Whalley Smythe Gardiner (No. 3) now in possession of the freehold and copyhold lands and the \*620] \*tithes and hereditaments in the parish of Fareham, comprised in the mortgage of the 25th and 26th of June, 1834, from Sir

James Whalley Smythe Gardiner (No. 2) to James Whalley Smythe Gardiner (No. 3).

A verdict was taken for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him, if, upon the evidence and admissions and the documents put in, the Court should be of opinion that he was entitled to succeed.

*Mellish*, Q. C., in Easter Term last, accordingly obtained a rule on the part of the plaintiff, calling upon the defendant to show cause why a verdict should not be entered for the plaintiff, pursuant to the leave reserved, on the ground that, in the events which had happened, the plaintiff, under the will and codicil of Sir James Whalley Smythe Gardiner, and the deed of the 21st of July, 1814, was entitled to the estates in question.

*Sir Hugh Cairns*, Q. C., *Manisty*, Q. C., and *Udall* showed cause.—They cited *Doe d. Heneage v. Heneage*, 4 T. R. 13, *Stanley v. Stanley*, 16 Ves. 491, *Lambarde v. Peach*, 4 Drewry 553, *Turton v. Lambarde*, 1 DeGex, F. & J. 495, *Carr v. The Earl of Erroll*, 6 East 58, and *Jarman on Wills*, 3d edit. 253.

*Sir Roundell Palmer*, S. G., *Mellish*, Q. C., and *Quain* were heard in support of the rule.—They referred to *The Bridgewater Case* (*Egerton v. The Earl of Brownlow*), 4 House of Lords Cases 1, 208, *Clavering v. Ellison*, 3 Drewry 451, 470, *The Earl of Scarborough v. Doe d. Savile*, 3 Ad. & E. 897, 965 (E. C. L. R. vol. 30), 6 N. & M. 884 (E. C. L. R. vol. 36), *Lambarde v. Peach*, 4 Drewry 553, *Morrice v. Langham*, 8 M. & W. 194,† *Thornhill v. Hall*, 8 Bligh, N. S. \*88, *Fazakerly v. Ford*, 4 Simons 390, *Taylor v. The Earl of Harewood*, [\*621 3 Hare 372, *Tayleur v. Dickenson*, 1 Russ. 521, *Smith v. Osborne*, 6 House of Lords Cases 375, and *Fearne's Contingent Remainders* 617.

*Cur. adv. vult.*

There being some division of opinion amongst the learned Judges, their judgments were delivered seriatim, as follows:—

BYLES, J.—I am of opinion that this rule ought to be made absolute.

The particular estates limited by the will of Sir James Gardiner now under consideration are either estates for life or estates tail. The testator provides against the coalescing in one owner of the possession of those estates with the possession of the estates devised by Sir William Gardiner's will. This he effects by a shifting clause or condition subsequent, to the effect that, if both lands come to the possession of the same person, whether a son or daughter or any of their issue, the estate shall go over to the next in remainder, as if that person had died or was then dead without issue.

If the construction of the will had been *res integra*, I should have thought that the two branches of this condition, to wit, "had died or was then dead without issue," ought to be read *reddendo singula singulis*; that is to say, that the words "had died" refer to tenants for life, and the words "was then dead without issue" referred to tenants in tail; as if the testator had said the estate shall go to the next in remainder, as it would have done had the person in possession, being tenant for life, died, or, being tenant in tail, died without issue.

This construction is fortified by the observation, \*that, [\*622 throughout the will and codicil, it is the tenant in possession

who is in terms disqualified, not the tenant in remainder, till he comes into possession. It is the coincidence of the *possession* of both estates which the testator desires to avoid. Further, the disqualification is to operate in favour of the next in remainder, not against him. Moreover, the terms of the codicil tend to confirm this interpretation. The testator, foreseeing that the two estates will coalesce in possession in his eldest son Sir James Gardiner (No. 2), the first tenant for life under his will, and being desirous, as he says, to make a codicil consistent with his will, revokes his eldest son's life estate, but does not go on to revoke the remainders to the eldest son's issue. Lastly, this distributive construction gives effect to every word in the shifting clause. So construed, the clause contains apt words appropriate to defeat estates for life, if they are to be defeated, and to defeat estates tail, if they are to be defeated.

But, if the shifting clause or condition be not so read, then the mention of the first alternative, "had died," is useless, and the disjunctive particle "or" is equally useless, for, the expression "was then dead without issue" would comprehend every case. Further, this other construction extends the disqualification to persons who are not and never may be in possession, inflicting a prospective forfeiture on the head and representative of the family, without a certain reason for the forfeiture.

But the former and distributive construction (which for the above reasons I should have thought the true one) does not seem to have been the construction put on the will by the Master of the Rolls, Sir William Grant. We have not had the advantage of seeing his judgment, but can only gather its effect from the decree and the deed \*623] settled in conformity therewith. \*Any Court, though its jurisdiction were supreme, would pay the greatest deference to so high an authority: and we, not being a Court of error, but only a Court of co-ordinate jurisdiction, are, I conceive, bound not only to regard it with respect, but to follow it, and to assume that the distributive construction is not the true one. And, even supposing the distributive construction to be the true construction, it is fatal to the plaintiff in this case; because, according to that construction, his right of entry is gone, for, it cannot, at latest, be postponed beyond the death of Robert Whalley, who took under the deed, and died more than twenty years before action brought.

But, assuming the words "*had died or was then dead without issue*" to apply to any taker of the Clerk Hill estate, whether tenant for life or tenant in tail, who should also come into the possession of the Gardiner estate, then also it seems to me that the rule should be made absolute; for the tenant for life and his issue are only to be considered as struck out and non-existing for the purpose of entitling the person *next in remainder* to take. That being so, the ultimate remainder to the plaintiff in tail general, following the remainders to the testator's younger sons, and preceding the remainder to the defendant, is not affected by the shifting clause, unless it can operate against him a second time, by reason of his having taken a portion of the estates devised by Sir William Gardiner.

On this second point, I agree with the rest of the Court; and the rule ought in my judgment to be made absolute.

WILLES, J.—In order to decide this case correctly, it is only necessary to put the proper construction upon the shifting clause. That clause begins by stating generally the intention of the testator, and then \*specially provides machinery for carrying that intention [\*624 into effect. It appears to me, that, construing the whole clause together, its operation was intended to be from time to time, toties quoties, as often as it was necessary to prevent the concurrence of the two properties, to accelerate the next remainder, upon the event happening which should call the shifting clause into operation. The provision in my reading of it, is not that *all things* should happen and take place as if the person who acquired the second estate were dead without issue; but simply and only that the next remainder should be accelerated and come into possession as it would if the taker were dead without issue,—leaving all the subsequent remainders in statu quo.

In the events which have happened, therefore, the precedent estate in tail male was expunged by the operation of the shifting clause, but the subsequent estate in tail general, under which the plaintiff claims, and which precedes the life estate to the defendant, and might descend to persons who could not have acquired the second estate, so as to come within the operation of the shifting clause, remains intact.

The rule therefore ought, I think, to be absolute to enter a verdict for the plaintiff.

WILLIAMS, J.—I am of opinion that our judgment in this case ought to be for the defendant, and the rule discharged; because I think that, according to the true construction of the shifting clause in the will of the testator, Sir James Whalley Smythe Gardiner, it must be deemed that his eldest son, the plaintiff's father, died without issue, and consequently that the plaintiff and his sister, so far as relates to the rights of his aunt (the defendant) under the will, must be regarded as non-existing persons; on which supposition the defendant became \*entitled to the estate in question, under the limitations of the will, on the death of her brother John Master [\*625 without issue.

In thus construing the shifting clause, I do not at all rely on the recital contained in it of the testator's "will and mind;" for, I agree with the argument of the counsel for the plaintiff, that the testator in that recital does not (as was supposed by the counsel for the defendant) say, that, if the Gardiner estate shall come to any one of the testator's sons, none of the issue of such son shall hold the Clerk Hill estate. I think it amounts to no more than an expression of the testator's wish that no son or daughter of his, or any issue of any son or daughter of his, who shall acquire the Gardiner estate, shall also hold the Clerk Hill estate. The question is, what was the testator's scheme for carrying that wish into effect.

The defendant says it was, that, whenever the event of the Gardiner estate coming, under Sir William Gardiner's will, to any of the persons thus described should happen, the rest of his own will was to be read and carried into effect for all purposes as if such person were dead without issue; in which case the defendant is clearly entitled. The plaintiff says the testator's scheme was, that such person should be deemed to be dead without issue, not as a general supposition, for

all the purposes of the will, but as an hypothesis, for the purpose, and for the single purpose, of ascertaining who was then to succeed as next in remainder; leaving all the subsequent limitations of the will, and consequently the estate in tail general under which the plaintiff claims, unaffected by that application of the hypothesis.

In support of the defendant's suggestion, the arguments are, that the scheme for which she contends is one which the testator might naturally and properly \*have adopted; for, he might well have  
\*626] thought, that, if the line of any one of his sons or daughters acquired the inheritance of the Gardiner estate, that line of his family was sufficiently provided for as to landed property, without having also the inheritance of the Clerk Hill estate; and that it would be therefore proper to treat that line, with relation to the latter inheritance, as if it had ceased to exist, so that the inheritance might pass over to the line of the next younger of his children; and so, from time to time, whenever the Gardiner estate, from failure of issue in the elder line, should pass, under Sir William Gardiner's will, to the next younger, the line to which it so passed should be regarded as if it were itself extinct, so as to let the Clerk Hill estate go over to the next still younger line. And it is further argued that the language employed in the shifting clause best adapts itself to such a project; because the testator says therein, that, as often as any person entitled under his will to the Clerk Hill estate shall acquire the Gardiner estate, then the Clerk Hill estate shall go from him to the person next in remainder, "in such manner as if he had died or was then dead without issue." The Clerk Hill estate is not merely to go as it would have gone if he were then dead, or as it would have gone if he were dead without issue male, but in such manner as if he were dead without issue male or female; that is, as if his estate and the estate limited both to his male and female descendants had perished. And reliance is also placed by the defendant on the word "accordingly" in the subsequent passage as to the cesser of the uses, which expression, it was argued on her behalf, indicated that the uses were to cease and determine, as well as shift, in like manner and as if the person who had acquired the Gardiner estate were dead without issue.

\*627] \*In support, on the other hand, of the plaintiff's contention that the testator's expressed wish would be best carried into effect by applying the supposition of the death without issue of the taker of the two estates to the single remainder next following in the will, and regarding it as an hypothesis for the purpose of then ascertaining who should be the next entitled, it is urged that the words used in the shifting clause do not directly take away or deprive any one of any estate limited by the will, but merely accelerate the title of the next remainder-man, who is described, in the singular number, as "the person." To which it is replied, on the part of the defendant, that it cannot be disputed, after the decree of Sir William Grant, but that the so-called hypothesis has plainly not only an accelerating but also a depriving and disentitling power beyond the estate of the first taker of the two properties; for that it is now an undisputed consequence of the testator's eldest son (who has been called during the argument Sir James No. 2) having succeeded to the two estates under the two wills, that not only his own estate in the Clerk Hill property,

but also the remainder to his first and other sons in tail male, perished; so that, not only the first taker of the two estates, but his first and other sons, and their issue in tail male ad infinitum, are excluded from the Clerk Hill estate by the power of the hypothesis. Why, then, should it not have the further power, as wide as its own language, of excluding the issue generally, both male and female? The answer given to this on the part of the plaintiff, is the argument on which, I think, his counsel mainly relied, viz. that the Gardiner estate never could go, under the will of Sir William Gardiner, to the female issue of any of the sons or daughters of the testator Sir James No. 1, and that, consequently, it was unnecessary and improper to exclude them \*from the Clerk Hill estate; and it was therefore unlikely that the testator intended so to do. But to this argument it is [628 replied that the testator may well have thought the whole stirps sufficiently provided for, if the head of it acquired the Gardiner estate. And another obstacle presents itself to the adoption of this argument, viz. that, in several cases which might happen, the application of the hypothesis *must* necessarily exclude the female issue. This would be so whenever, in the events which occurred, the estate in tail general limited to any one of the grandsons had become immediately consequent on the estate limited to him in tail male. For instance, suppose, at the death of the testator, he had left only one son, Sir James No. 2, his sons Robert and John Master having predeceased him without leaving issue,—it is plain that the Clerk Hill estate would have passed from Sir James No. 2 to his sister, the defendant, to the exclusion of any daughters he might have, though such daughters could never take the Gardiner estate under Sir William Gardiner's will. So, if all the testator's sons had predeceased him, Sir James No. 2 having alone left a son, the plaintiff, it is obvious that the Clerk Hill estate would have passed from him over to his aunt, the defendant, excluding any daughters he might have, though they could in no event have become entitled to take the Gardiner estate.

To these suggestions, it was answered, on the part of the plaintiff, that these were not the states of the family which the testator had in contemplation; for that, when he made the will, he had three sons, with the prospect of further issue, and the limitations of the will were adapted to the state of the family with which he was conversant, and not to such remote possibilities.

But the will itself will hardly warrant such an \*answer. It [629 is plainly the will of a far-sighted testator, providing for still more remote contingencies and consequent shiftings of the estate; for instance, it contemplates the possible event of the Gardiner estate coming to the issue of one of his daughters under Sir William Gardiner's will,—an event which could not happen until after the death without issue of all the sons of the testator (Sir James No. 1) then born or to be born, and the death of at least one of his daughters.

Other difficulties might likewise arise, in the possible course of events, if the scheme suggested on the part of the plaintiff were adopted: for, suppose, at the death of the testator, his eldest son, Sir James No. 2, was already dead, leaving his brothers Robert and John Master him surviving, and no other brothers,—then, the eldest son of Sir James No. 2 succeeding to the Gardiner estate, the Clerk Hill

estate would go, under the shifting clause, to his uncle Robert. But, supposing his uncle Robert and his uncle John Master were afterwards to die without issue male, then, according to the plaintiff's view of the will, the Clerk Hill estate would not pass over to his aunt, the defendant, but the estate limited in tail general to him in remainder after the failure of the male issue of his two uncles, would fall into his possession. What, then, would happen, supposing the entail of the Gardiner estate not to have been barred? Would the Clerk Hill estate shift from him a second time? It is difficult, I think, to maintain that the testator could have intended such a thing, even if the words of the shifting clause would apply to such a state of circumstances; which, I think, is doubtful; because the event of the Gardiner estate coming to the possession of the person entitled to the Clerk Hill estate would have only happened once, when it caused the former shifting, and did not happen again, so as to operate a second shifting. And, if \*630] \*there be no second shifting, then it is obvious that the testator's grandson would enjoy both the estates under the two wills,—to the entire frustration of the testator's wish.

After full consideration of the arguments on both sides, I have come to the conclusion that the mode suggested by the defendant for carrying the testator's declared wish into effect, is the one which he intended. It has the recommendation of simplicity and of causing an unvarying effect when applied; and it gives full employment to the hypothetical terms which are used by the testator. Nor can I ascribe much force to the objection made on the part of the plaintiff, that the clause points at the "person" next in remainder, in the singular number. The testator is there only considering what the immediate effect will be of the application of the hypothesis that the taker of the two estates is dead without issue. The language would surely have been the same if the clause had afterwards gone on to provide expressly that the uses limited should cease and determine for all the purposes of the will, and with respect to all the limitations contained in it, as if he were then dead without issue; so as to make it plain that the estate in tail general was to be annihilated, as well as the estate in tail male.

But, to the scheme suggested by the plaintiff, there is the objection that it is not wide enough to call for the use of the hypothesis, which occasionally would, in effect, require to be narrowed to that of the death of the first taker of the two estates without issue *male*, instead of death without issue generally. Again, the scheme is objectionable, as excluding or admitting the female issue of the testator's grandsons, not by any general rule, but according to the casual course of the events which may happen.

It may be observed that I have abstained from adopting any of the arguments of the defendant's \*counsel which were founded on the assumption that the testator was influenced in the framing of his will by his knowledge that the estates in tail male created thereby might be converted into a fee simple. These arguments would be powerful if such an assumption could properly be made. But, although there are some indications of a knowledge of this kind in the part of the will which relates to the settlement of the furniture, books, and china, and perhaps also in that part of the codicil which

extends the shifting clause in the will to the Oxfordshire estate, by reason of its being superfluous if the entail of the Gardiner estate was not barred, yet I do not think these circumstances are sufficient to justify a departure from the general rule, that, in judging of a testator's intentions from the nature of the limitations of his will, it must be deemed that he supposes the estates will go in the course of limitation to which he has subjected them.

I have not at all adverted to the codicil, not thinking that it contains anything on which any argument can properly be founded on either side.

I cannot forbear to add, in conclusion, that, although I am sorry to differ from the rest of the Court, I am glad, for my own part, to be able, without departing from any principle, to arrive at a construction of the will which, if it were adopted, would effectuate, and not frustrate, the testator's wish, of preventing both the Gardiner estate and the Clerk Hill estate being enjoyed by the same line of his descendants, although the ultimate remainder of the Clerk Hill estate limited by the will has not taken place and come into actual possession.

ERLE, C. J.—Upon this rule, the question turns on the construction of the shifting clause in the will of Sir James Whalley Gardiner, whom in this judgment I \*will call "the testator." For the [\*632 purpose of that construction, the scheme of the will of the testator and of the will of Sir William Gardiner should be considered.

The testator devised his Clerk Hill estate to each of his three sons and their issue in succession, thus,—to the first son, James, for life, remainder to his sons in tail male, with like remainders to Robert and his sons, and John and his sons. Then followed further remainders to the sons of James in tail general, with like remainders to the sons of Robert and John. Then followed further remainders to the daughters of James in tail male, with like remainders to the daughters of Robert and John. Then followed further remainders to the daughters of James in tail general, with like remainders to the daughters of Robert and John. Then followed the further remainder to the testator's daughter Elizabeth, the present defendant, for life, with remainders over, which, as well as the remainders to unborn children, are omitted, as not material in this action.

Sir William Gardiner devised the Gardiner estate to pass in a series of remainders, inter alia, to Sir James, the testator, for life, remainder to his first and other sons in tail male, with remainders over in the male line, and with no remainders in the female line. Thus, the line for the devolution of the Gardiner estate was only in part the same as the line for the devolution of the Clerk Hill estate.

If the remainder in the Gardiner estate for life vested in the possession of the testator, then, at his death, his first son would take possession of the Gardiner estate under the remainder to him in tail male, and would take possession of the Clerk Hill estate for life under the devise in the testator's will.

The testator purposed to prevent this joining of the possession of the two estates, by the shifting clause, \*which we are now to [\*633 consider. It begins by reciting the devise by Sir William Gardiner, and the will and mind of the testator that the Clerk Hill

estate should not be held by any one of his sons or daughters, or his, her, or their issue, after such son or daughter, or such his, her, or their issue, should come into possession of the Gardiner estate. Then follow the operative words,—“As often as the Gardiner estate shall come to the possession of any of my sons or daughters, or any of their issue, then the person next in remainder according to the limitations of this will shall be entitled to and shall come into possession of the Clerk Hill estate for the estate and interest thereby limited to him, and so from time to time as often as that event may happen, in such manner and as if the person so possessed of the Gardiner estate had died or was then dead without issue, and the uses of the Clerk Hill estate shall accordingly cease and shift from time to time, so as the said two estates may never be held or enjoyed in possession by any of my sons or daughters or their issue together and at the same time.”

The codicil has no effect in deciding the present question.

At the death of the testator, this clause came into operation. At that time, his eldest son, James No. 2, had no child, and the remainders to his sons in tail male could not take effect, and therefore the person next in remainder for the Clerk Hill estate was Robert; and if the clause directs that the Clerk Hill estate after shifting should pass in the line of remainders limited by the will, the remainders in tail male to the sons of James No. 2 could never vest in possession. This I mention as one answer to the objection that the plaintiff's claim was barred by the Statute of Limitations, on the ground that the Clerk Hill estate was to shift \*upon the devisee thereof taking the Gardiner estate, in such manner as if he were dead, in case he were tenant for life of the Clerk Hill estate, or dead without issue if he were tenant in tail of the Clerk Hill estate. It is possible that this construction may be supported, though I do not sanction it: but, if it is supported, the remainder to the sons of James in tail male never vested in possession, and the remainder in tail general did not vest till 1861.

There is another answer to the same objection. The legal estate passes under the conveyance of 1814, made in pursuance of the decree made in 1811. By that conveyance, Robert took the legal estate for his life, with remainder to his sons in tail male, with remainders over in the line according to the will; and the son of James had no right to the possession under these limitations till 1861.

I return to the question between the parties upon the construction of the shifting clause.

The plaintiff contends, that, when the event happened that the two estates devolved upon James No. 2, the use of the Clerk Hill estate limited to him ceased, and shifted to the person next in remainder under the will, viz., Robert; and that then its operation ceased; leaving the remainders after Robert entirely unaffected. The defendant contends, that, when the event happened, not only the uses limited to James ceased, but also all the uses limited to any of his issue by any devise of the Clerk Hill estate in remainder also ceased, so that he became a stirps of incapacity for taking the Clerk Hill estate, all his issue being as incapable of taking as if they had never existed, that is, as if he had died without issue.

I am of opinion that the plaintiff is right. By his construction,

effect is given to all the words of the clause in their ordinary meaning, and the declared \*purpose of the testator is attained. I refer [\*685 to the operative words of the clause to show that the Clerk Hill estate was to shift from the individual taking the Gardiner estate, not from him and his issue; and to the provision for shifting toties quoties, to show that the purpose of the testator would be certainly attained by that construction, as the two estates could never coalesce.

The defendant's construction is not according to the ordinary meaning of the words used, as there are none to make a line of issue incapable of taking Clerk Hill. Also, it is not in accordance with the purpose of the testator that the objects of his bounty should take in the order prescribed in his will, provided the coalition of the two estates could be prevented; but it would take the Clerk Hill estate away from some devisees who could not by possibility take the Gardiner estate, that is, from the devisees in the female line. The defendant's construction is only supported by a strained interpretation of the words "as if he were dead without issue." Those words have full effect according to the plaintiff's construction. If they are strained to the meaning contended for by the defendant, then words creating an estate in perfect certainty are defeated by a strained implication from words of doubtful meaning.

If at the death of the third son, John Master, in 1861, the entail of the Gardiner estate had not been barred, the son of James, the present plaintiff, would have had the Gardiner estate, and the Clerk Hill estate would have shifted, according to the plaintiff's construction, to his sister, the daughter of James No. 2; according to the defendant's construction, to his aunt, the daughter of the testator, the present defendant, and so his sister would have been disinherited; yet the will vested a clear remainder in her in priority \*to the remainder to the [\*636 defendant: and so an estate created by clear words would be defeated by an implication from the shifting clause, without in any degree fulfilling thereby the purpose of the testator in making the shifting clause.

It is true, that if, at the death of the testator, James No. 2 had issue one daughter only, and no brother, the Gardiner estate would have vested in him, and, according to the plaintiff's construction, the Clerk Hill estate would have gone to his aunt, the defendant, and not to the plaintiff's sister; and so the daughter of James No. 2 would have lost her estate in the Clerk Hill property, and would not have had the Gardiner property. But the answer is, that it appears by the will and codicil, that, at the time they were made, the testator contemplated the state of his family, viz. three sons all unmarried, and knew that the case now supposed could not occur at his death, and adapted his devises with the shifting clause to the known state of his family; and the clause so adapted, according to the plaintiff's construction, would not defeat any estate, unless the coalition of the two properties could not otherwise be prevented.

If decisions on the construction of other wills can be usefully referred to for the purpose of construing this will, I consider the case of Carr v. The Earl of Erroll, 6 East 14, to support the plaintiff's case, because it contains clear words rendering the issue of the tenant for life incapable of taking the devised estate after it should have

shifted from the tenant for life under the shifting clause in that will; but no such words are found in this testator's will.

There was a second point mentioned but scarcely argued for the defendant, viz. that the plaintiff was in possession of part of the lands which had passed under Sir William Gardiner's will to the testator, \*637] and so to \*his son James No. 2, and that therefore he was in possession of the Gardiner estate mentioned in the testator's will, and so incapable of holding the Clerk Hill estate at the same time. But there are two answers to this point, each of which is sufficient. First, the plaintiff takes the lands in question, not under Sir William Gardiner's will, but by a title wholly unconnected therewith. The estates tail created by that will have been barred, and the fee simple created thereby has passed by a new title; and, although they are the same lands, they are not part of the estate created by Sir William Gardiner's will. That is the first answer. It also appears by the admissions that the lands formerly part of those comprised in the Gardiner property are only a small part held under a new title, and subject to encumbrances that could not have been imposed on the estate tail, if he had taken it under the devise. Though he holds some of the same lands, he has not in substance the same amount of property, nor in title the same estate as that to which the shifting clause referred.

The cases cited by the Solicitor-General are decisive against the defendant on this point. I am therefore of opinion that the rule should be made absolute for entering the verdict for the plaintiff.

Rule absolute accordingly.(a)

(a) Judgment affirmed on appeal in Exchequer Chamber, 15 C. B. N. S. 170.

\*638]

\*ALLEN v. SMITH. May 27.

A man goes to an inn, with two race-horses and a groom, in the character of guest. They remain there for *several months*, taking the horses out every day for exercise and training, and being occasionally absent for several days together at races in different parts of the country, but always with the intention of returning to the inn :—

Held, that, in the absence of evidence of any alteration in the relation of the parties, that of innkeeper and guest must be presumed to continue; and that the occasional absences did not destroy the innkeeper's lien upon the horses for his bill.

Held also, that the fact of the innkeeper's having claimed a lien for the whole time, when in truth he was entitled for a part of it only, was not such an excess of claim as to dispense with a tender of that which was really due.

THIS was an action for the detention and the conversion of two race-horses, Nimrod and Magenta.

To the count in trover, the defendant pleaded not guilty.

To the count in detinue,—fourthly, that the defendant was during all the time thereafter referred to an innkeeper, and kept a common inn for the reception of travellers and others; and that, before and at the time of the alleged detention of the said horses, he the defendant had a lien on the same for money payable by one Thomas Burrowes to the defendant for the lodging and entertainment of the said Thomas Burrowes and a groom in his employ as guests at the said inn, and for

the keep and stabling of the said horses which the said Thomas Burrowes (he then being lawfully possessed of the said horses) had brought with him to the said inn when he and his said groom became such guests as aforesaid, found and provided by the defendant as such innkeeper as aforesaid within his said inn for the said Thomas Burrowes and his said groom as such guests as aforesaid at the request of the said Thomas Burrowes,—of all which the defendant before and at the time of the said alleged detention had notice; and that the said money remained and was wholly due and unpaid, and the said lien in full force and effect, wherefore, &c.

There was a fifth plea to the count in detinue, similar to the fourth, only alleging that Burrowes had been intrusted with the horses by one John Cunningham, the then owner thereof, and that the lien claimed was for money payable by the said John Cunningham for the lodging and keep of Burrowes and the horses.

\*The cause was tried before Byles, J., at the sittings in London after last Hilary Term. The facts which appeared in [\*639 evidence were as follows:—On the 15th of March, 1861, one Thomas Burrowes, who was a stud-groom and trainer, and who had been long known to the defendant, came to the defendant's inn, the Wheatsheaf, at Westbury, in the county of Wilts, with the horse Nimrod, on his way to the meet of the Wiltshire hounds at that place. After staying there a short time to refresh and bait his horse, he departed, but returned that evening, and slept at the Wheatsheaf. On the following morning, a groom in Burrowes's employ arrived at the inn with the other horse, Magenta; and Burrowes and the groom remained there with the two horses, with the exception of certain intervals of absence when they went with the horses to run at races in various parts of the country, down to the 11th of October. Besides these occasional absences, the horses were taken out daily for exercise on the downs.

It appeared that the horses in question had belonged to one John Cunningham, who had intrusted them to Burrowes for the purpose of their being entered and run at such races as Burrowes might think fit, on the terms of his (Burrowes's) paying all expenses of training, keeping, and entering them, and handing over to Cunningham one-third of their winnings. This arrangement, however, was never communicated to the defendant, who always imagined the horses to be the property of Burrowes.

In September, 1861, John Cunningham sold the two horses to the plaintiff, sending an order to Burrowes to deliver them up to him. In reply to this, Burrowes wrote to Cunningham, telling him that there was a long bill owing to the landlord of the Wheatsheaf for keep, and that he declined to allow the horses to \*be removed until his demand was satisfied. Upon receiving Burrowes's letter, [\*640 Cunningham wrote to the defendant, as follows:—

“8th October, 1861.

“Mr. Smith.

“Sir,—You are aware that the two horses, Nimrod and Magenta, that Burrowes has been running about the country, belong to my family, and were intrusted to him under the following conditions,—that we were to have one-third of their winnings, and to be at no expense whatever. Magenta he has had for two years, and Nimrod

for one year, and every farthing we have received from him on account of winnings is 15*l*. Not liking this style of thing, I made up my mind to sell both horses; and I have made several applications to him to return them. This morning brings me a letter from him saying you have a bill against them, and will not let them go till it is paid. Will you please let me know if this is correct; and, if so, please let me have your account. Understand, if Burrowes's story is true, I hold you responsible for both horses from this date, as I mean to bring an action against Burrowes for breach of contract, and also for moneys due from stakes won. I have sold both the horses to a gentleman who knows them both as well as Burrowes does, if not better. I will spend 500*l*. over this affair, sooner than Burrowes shall cheat me with my eyes open. Please let me have your account without delay. I give you strict orders that the horses are not to be trained, but merely to have walking exercise under your own eye, until I have time to wake Mr. Burrowes up. You can read him this letter if he is with you. I will give Burrowes an opportunity of appearing in a witness-box before a big-wig,—a thing I know he likes. Understand me \*641] plainly, I do not wish you to be a loser: \*but, having on all occasions done my best to serve Burrowes, I will not put up with such treatment.

JOHN CUNNINGHAM."

On the following day, the defendant sent Cunningham this answer:—

"Westbury, 10th October, 1861.

"To J. Cunningham, Esq.

"Enclosed is the bill for the keep of your horses and men up to tomorrow (Friday). The horses are well and big; and I should thank you to settle the account, and remove them as soon as possible.

THOMAS M. SMITH."

The following is a copy of the account enclosed:—

"J. Cunningham, Esq., Dr. to T. M. Smith.

"1861. March 15th to 11th October, thirty weeks' stabling and keep of two horses (Magenta and Nimrod) at 2*l*. per week . . . . . £60 0 0

"Thirty weeks' board of man at 1*l*. . . . . 30 0 0

90 0 0

"Deduct nine weeks for absence of horses and man, 30*s*. . . . . 13 10 0

£76 10 0

On the 1st of November, the plaintiff called on the defendant with a letter from Cunningham, authorizing him to receive the horses, and demanded them. The defendant refused to let them go without first receiving the amount of his bill.

The defendant swore that he had never in his life taken in horses to stand at livery.

A verdict was taken for the plaintiff for the value of the horses, 210*l*., to be reduced to 1*s*. upon their being given up; and leave was \*642] reserved to the \*defendant to move to enter a verdict for him, if the Court should be of opinion that his claim of lien was

well founded,—the Court to have power to draw such inferences from the facts as a jury might have done.

*Montague Smith*, Q. C., in Easter Term, obtained a rule nisi accordingly.

*Hawkins*, Q. C., and *David Keane* showed cause.—These horses were on the premises of the defendant, not as the horses of a guest at an inn, but to stand at livery, and consequently he had no lien for their keep, in the absence of a special contract: *Judson v. Etheridge*, 1 C. & M. 743,† 3 Tyrwh. 954; *Smith v. Dearlove*, 6 C. B. 132 (E. C. L. R. vol. 60); *Orchard v. Rackstraw*, 9 C. B. 698 (E. C. L. R. vol. 67); notes to *Calve's Case* (8 Co. Rep. 32), 1 *Smith's Leading Cases*, 5th edit. 102. The principle is, that, an innkeeper is compellable at common law to receive travellers and their horses and carriages; but a livery-stable keeper is not. The very term "standing at livery" implies that the horse is to be delivered up for the use of the owner whenever he pleases. The common-law duty of the innkeeper is well defined in the writ given in the *Registrum Brevium*, "De Transgressionem, p. 105, Fitz. N. B. 94 B.,—*Quare cum secundum legem et consuetudinem regni nostri Angliæ hospitatores, qui hospitia communia tenent ad hospitandum homines, per partes ubi hujusmodi hospitia existunt, transeuntes, et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque distractione seu amissione custodire die ac nocte teneantur, ita quod pro defectu dictorum hospitatorum vel servientium suorum hospitibus hujusmodi damna non eveniant ullo modo.*"(a) Can it be said that *Burrowes* and the two horses during their thirty weeks' stay at \*the Wheatsheaf filled the character of "transeuntes?" Besides, if ever there was a lien, it was lost by the subsequent [\*643 mode of dealing with the man as a lodger and the horses as livery horses at a weekly charge, and by permitting the horses to be absent for long intervals. [BYLES, J.—They were never away sine animo revertendi, or without the defendant's knowing where they were going and when they might be expected back. And the defendant swore that he had never taken in a horse to stand at livery.] At all events, the claim of lien was excessive. From the moment the lien is set up, the defendant was bound to feed the horses. In *Somes v. The British Empire Shipping Company*, 8 House of Lords Cases 338, it was held that a person who has a lien upon a chattel cannot, if he keeps it to enforce payment, add to the amount for which the lien exists a charge for keeping the chattel till the debt is paid. There, a shipowner desired to have his ship repaired. On asking a shipwright for an estimate, he received one, the last item of which was "The cost of use of graving-dock for the job will be from 120 to 150 guineas." The ship was repaired. When finished, the account was sent in with this item included. No objection was made to this item; but time was required for payment. The shipwright, who claimed and enforced his lien on the ship for payment, urged the removal of the ship, saying that it was unnecessarily occupying his dock, that he had other ships waiting to go in, and, finally, that, from and after a certain day, he should charge 21*l.* a day for the use of the dock. It was held by the House of Lords, that these facts did not constitute an

(a) See *Dawson v. Cholmeley*, 13 Law J., Q. B. 33.

implied contract on the part of the shipowner to pay the additional charge; and that, having paid it under protest, he might maintain money had and received to recover it back.

\*644] *Montague Smith, Q. C.*, was not called upon to support his rule.

ERLE, C. J.—I am of opinion that this rule should be made absolute. It is clear that these horses were brought to the Wheatsheaf and there received by the defendant in his character of innkeeper receiving a guest with his horses and servant; and that Burrowes and his man came within the description of "transeuntes" in the old writ which has been referred to. They came to the inn and were entertained there as "travellers;" and the contract they commenced with must be presumed to continue until a new contract is shown to have been entered into. I see no evidence of any new contract. It is urged on the part of the plaintiff, that, although they may at first have been received as ordinary guests, after staying there a considerable number of days the character of guest was changed into that of lodger. No precedent has been cited to warrant that: and I must confess I do not see any reason for it. It seems to me that the circumstance of the horses having been allowed to go out in the ordinary way of a guest riding or driving out and intending to return, cannot have the effect of defeating the innkeeper's lien. The intention to return was strongly indicated by Burrowes's going out on each occasion without as it would appear asking for his bill. The fact of the claim set up by the defendant being too large would not defeat his lien, inasmuch as no tender was made by the plaintiff.

WILLES, J.—I am of the same opinion. The horses were originally placed in the stable of the inn as the horses of a guest, and nothing has since occurred to alter the nature and character of the bailment, and therefore the defendant's lien upon them continued.

\*645] *That is enough to dispose of this rule.* I agree that a claim of lien of a larger amount or on a different account than that for which the party is entitled to it, may in some cases amount to a dispensation with a tender. But claiming a lien for the keep of the horses and the lodging of the men for a longer time than the defendant was in strictness entitled to it, clearly would not exonerate the plaintiff from making a tender. If the defendant had been shown the lesser amount, possibly he would have been quite willing to accept it.

The rest of the Court concurring,

Rule absolute.

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THE CHURCHWARDENS AND OVERSEERS OF ST. NICHOLAS, ROCHESTER, Appellants; THE CHURCHWARDENS AND OVERSEERS OF ST. BOTOLPH-WITHOUT-BISHOPS-GATE, Respondents. *June 6.*

By a local Act of 1 G. 2, c. xx., certain revenues were vested in the guardians of the poor of Canterbury, in trust for the maintenance and employment of the poor of that city: and the guardians were required to give bond under their common seal, for themselves and their successors, for ever thereafter to provide for, clothe, and maintain sixteen poor boys of the

said city, to be called Bluecoat Boys, and cause the said sixteen boys to be instructed, &c, and put them and every of them respectively out apprentices after they and every of them respectively should have attained their respective ages of thirteen years, and before their said ages of fifteen years, &c. :—

Held, that this gave the guardians no authority to apprentice the boys against their will, or after the age of fifteen.

Where, therefore, a boy was apprenticed by the guardians at seventeen, but did not execute the indenture,—Held, that the indenture was invalid, and that a service by the apprentice under it conferred on him no settlement.

THE following case was stated for the opinion of this Court, pursuant to the statute 12 & 13 Vict. c. 45, s. 11, on an appeal against an order for the removal of Charles Drury and his two children from the parish \*of St. Botolph-without-Bishopsgate to the parish of St. Nicholas, Rochester. [\*646

It appears from an entry on the close-roll, the 14th of May, in the 17 Eliz., that the citizens of Canterbury, being greatly charged to sustain the poor living and resorting there, were desirous of obtaining the revenues of the Poor Priests' Hospital, hereinafter mentioned, for the use of the poor in the city, to be employed for their sustentation and relief, as to the mayor and commonalty should seem expedient: and one Blaze Winter, the master of the said hospital, with the consent of the patron and of the Dean and Chapter, accordingly surrendered the hospital hereinafter mentioned and its possessions and endowments to the Queen, upon express trust that she should grant them out to the mayor and commonalty of Canterbury. Afterwards, on the 5th of July in the same year, the Queen, by letters patent, granted the said hospital, with its possessions and endowments, to the said mayor and commonalty.

By an Act of Parliament of the 1 G. 2, c. xx., intituled "An Act for erecting a workhouse in the city of Canterbury, for employing and maintaining the poor there, and for better enlightening the streets of the said city," it was enacted that there should be a corporation within the said city, to consist of a mayor, recorder, and justices of the peace of the said city and county of the same for the time being, and twenty-eight other persons to be chosen in manner therein mentioned, two out of each parish; and the said mayor and other persons should be called the guardians of the poor of the city of Canterbury; and they and their successors should be for ever thereafter one body politic and corporate in law, and should have perpetual succession and a common seal.

Section 13 of the said Act recites the grant by \*Queen Elizabeth before mentioned, as follows:—"And whereas, [\*647 Elizabeth, Queen of England, had granted unto the mayor and commonalty of the said city of Canterbury and their successors for ever, the hospital for poor priests within the said city, and other lands and tenements to the said hospital appertaining, which hospital, lands, and tenements had been ever since held and enjoyed by the said mayor and commonalty for the time being, and had been by them made use of, and the rents and profits thereof applied and disposed of towards the maintenance and lodging of several poor boys of the said city, commonly called Bluecoat Boys;" and then enacted "that the said hospital, lands, and tenements, as well within the said city as in the county of Kent, should be settled and vested in the guardians of the

poor of the said city thereby constituted and made a corporation, upon trust that the several guardians of the poor of the said city should employ the said hospital, lands, and tenements for the benefit and advantage, maintenance, and employment of the poor of the said city intended to be provided for, maintained, and employed by the said corporation thereby created, and as would best answer that end and purpose." And it was also enacted by s. 16 "that the said guardians should provide a good and sufficient house of correction to and for the use of the said city, in lieu of the hospital, a part of which had been formerly used as a house of correction for the said city, and one or more masters of the same." And it was by s. 18 of the said Act further enacted "that the said guardians of the poor should give bond under their common seal, for themselves and their successors, for ever thereafter to provide for, clothe, and maintain sixteen poor boys of the said city, to be called Bluecoat Boys, and furnish them with all \*648] manner of necessaries, and an apartment by themselves, \*separate from the other poor in the said hospital, and cause the said sixteen boys to be instructed in reading, writing, and accounts, and *put them and every of them out apprentices after they and every of them respectively should have attained their respective ages of thirteen years and before their said ages of fifteen years*, and pay with every such boy so to be put out apprentice the sum of 5*l.* at least; which said sixteen poor boys should be nominated, elected, and appointed by the said mayor and commonalty of the said city; and as often as there should be any vacancy by death or putting out apprentice of any one or more of the said sixteen boys, or by any other means, the said mayor and commonalty of the said city and their successors should nominate and appoint other poor boy or boys of the said city to supply such vacancy."

By s. 25 of the said Act it is enacted that the said guardians of the poor should take care and provide for the maintenance of all the poor of the fourteen parishes mentioned in the Act; and by s. 26 power is given to the said guardians to employ the poor of the said city, and by indenture under their common seal to bind any poor child of the said city or parishes after such child shall have attained the age of fifteen, or sooner, provided such child be not bound for a longer time than that mentioned in that section.

By s. 20, power is given to the said guardians to make rates for maintaining the poor, for building a workhouse and house of correction, and for the other purposes in the Act mentioned.

No workhouse was built by the guardians under the powers of the said Act: but a part of the hospital was converted into a workhouse, and used as such until the building of a new workhouse under the Poor Law Amendment Act, 5 & 6 W. 4, c. 76. Another part of the \*649] said hospital was used for the Bluecoat \*School; and another part for a house of correction. The new workhouse was erected on part of the lands belonging to the hospital.

A bond from the guardians to the mayor and commonalty was duly given shortly after the passing of the Act, as required by s. 18.

In the year 1821, the Bluecoat Boys were educated and lodged in the portion of the hospital set apart for them, but took their meals in common with the other poor in the said workhouse. The whole

building, comprising the hospital, was commonly called and known as "The Workhouse."

From the time of the passing of the Act until the year 1849, the receipt of all the moneys arising from the rents and profits of the said hospital, lands, and tenements, and the receipt of the moneys raised by rates for the maintenance of the poor of the said city, were all entered in one book, and the disbursements made for the maintenance and apprenticing of the poor Bluecoat Boys, and for the maintenance and apprenticing of the other poor boys of the said city, were made generally out of the moneys so received; and no accounts exist showing specially what portions of the money were expended for the benefit of the said sixteen poor Bluecoat Boys, or for the other purposes of the Act.

The said guardians kept and maintained the sixteen poor boys called Bluecoat Boys and the other poor of the said city, and discharged and paid the various liabilities imposed upon the said guardians by the said Act. The poor-law auditor has, since the year 1849, audited the whole of these accounts. Since the year 1849, the accounts of the rents from the said lands and tenements have been kept separate, and by different officers,—those of the lands and tenements being kept by the receiver, and those relating to the poor by the clerk of the poor-law guardians.

\*The rents and profits arising from the lands and hereditaments so granted to the corporation by Queen Elizabeth have [\*650 always been more than sufficient for the maintenance, educating, and apprenticing the Bluecoat Boys; and, at the time of apprenticing the pauper, the said rents and profits amounted to the yearly sum of 500*l.* and upwards. The said Act 1 G. 2, c. xx., was to be considered as incorporated in and forming part of this case.

Charles Drury, the pauper, was duly nominated and elected one of the said Bluecoat Boys, and maintained and educated in pursuance of the said Act up to the time of his apprenticeship, as hereinafter mentioned.

By indenture of apprenticeship, dated the 13th of April, 1821, and bearing a 1*l.* stamp, under the common seal of the said guardians, and executed by Samuel Paris, of the city of Rochester, cordwainer, it is witnessed that the said guardians, by virtue and in pursuance of the powers to them given in and by the said 1 G. 2, c. xx., put out, placed, and bound the said Charles Drury, a poor Bluecoat Boy, then in the workhouse of the said city, and an inhabitant of the parish of St. Margaret, in the said city, apprentice to the said Samuel Paris, with him to dwell and serve from the 9th of the said month of April, for seven years: And by the same indenture the said Samuel Paris, in consideration of 20*l.* paid by the said guardians, covenanted to teach the said apprentice the trade of a cordwainer, and to provide for the said apprentice, so that he were not always a charge to the said parish of St. Margaret or city of Canterbury.

The said Charles Drury at the time of the binding was upwards of seventeen years of age, and the said indenture was not executed by him.

No inquiries were made by two justices, as required by the 56 G.

\*651] 3, c. 139; nor was any order made for \*binding the said boy. The said indenture was not allowed by two justices; nor was any notice given to the overseers of the poor of the said parish of St. Nicholas, Rochester, of the intended binding: and it may be taken generally that the provisions in force at the time of the binding, relating to parish apprentices, were not complied with.

At the time of the apprenticing of Charles Drury, different forms of indentures were used by the said guardians for apprenticing poor Bluecoat Boys and other poor boys,—the former being described in the indentures as “poor Bluecoat Boys,” and the latter being described as “poor boys:” the usual premium paid on binding the former boys was 20*l.*, and for the latter, sums varying from 3*l.* 10*s.* to 10*l.*

The said Charles Drury served his said master under the said binding for a time, and then ran away, and during the whole of such time dwelt in the appellant parish of St. Nicholas, Rochester, and gained a settlement therein, assuming the said indenture to have been valid and lawful.

An order or warrant for the removal of the said Charles Drury and his two children from the respondent parish of St. Botolph, Bishopsgate, to the said appellant parish, as the place of their last legal settlement, on the ground of his said apprenticeship and service, was duly made on the 24th of August, 1861.

The question for the opinion of the Court was, whether the said indenture was valid, and whether the said Charles Drury acquired a settlement by service and inhabiting under the same in the appellant parish.

If the Court should decide this question in the affirmative, then the said order of removal was to be confirmed, with costs: but, if the Court should be of the contrary opinion, then the said order was to \*652] be quashed, with costs. And it was agreed that a \*judgment in conformity with the decision of the Court should be entered, on a motion by either party, at the sessions next or next but one after the said decision should have been given. And it was agreed that the Court should have power to draw any inferences of fact.

*Poland*, for the appellants.—There was no valid binding, and consequently no settlement could be gained by service under the indenture. There was no compliance with the 56 G. 3, c. 139, s. 11, which enacts that no indenture by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices, under their hands and seals: and the boy himself did not execute the indenture. In *The King v. Arnesby*, 3 B. & Ald. 584, it was held that an indenture of apprenticeship executed by the master and father, but not by the apprentice himself, is invalid. Reliance will probably be placed on the 1 G. 2, c. xx., the 18th section of which empowers the guardians to apprentice the Bluecoat Boys between the age of thirteen and fifteen. But there is nothing in the statute to enable them to do this by compulsion. The contention on the other side must go to this extent, that the indenture would be valid if executed by the guardians without the consent and against the will of both the boy and his father. [ERLE, C. J.—The duty cast upon the guardians, is, to apprentice boys between the ages of thirteen and fifteen. The propositus

is over seventeen,—two years out of time. What authority had the guardians? If the apprenticing at seventeen is good, why might it not be equally so at twenty-one? We will hear what the respondents have to say.]

*Le Breton*, for the respondents.—The statute 1 G. 2, \*c. xx., [\*653 which vests in the guardians the revenues of the Poor Priests' Hospital, and imposes upon them the duty to clothe, educate, and maintain the Bluecoat Boys, and afterwards to apprentice them, by implication necessarily gives them the power to bind the boys without assent and without execution of the indenture of apprenticeship by the boys themselves. The words used are "put them out apprentices," which implies something more than "bind," which is the word generally found in the statutes upon this subject. It is true, the boy in this case was beyond the age limited: that, however, would not make the indenture void, but voidable only. The 43 Eliz. c. 2, s. 5, empowered the churchwardens and overseers, with the assent of two justices, to bind poor children to be apprentices, where they shall see convenient, "till such man-child shall come to the age of four-and-twenty years, or such woman-child to the age of one-and-twenty years or the time of her marriage; the same to be as effectual to all purposes as if such child were of full age, and by indenture of covenant bound him or herself." In *Rex v. The Inhabitants of St. Petrox*, Burr. S. C. 248, 1 Wils. 96, it was held that an indenture binding such apprentice, being a female, until the age of twenty-one years *absolutely*, was not void, but voidable only. The Court there said that they thought the indenture "not void for want of the alternative of marriage, though perhaps not obligatory upon the parties." And they go on to say,—“And though, in the Ipswich Case, the indenture was holden 'not to be binding as between the parties,' yet it was holden to be neither void nor voidable by the parish as to the gaining a settlement. But even if there was no authority in the case, yet the indenture ought not to be considered as *absolutely void*, but *only voidable*; for, it would be extremely hard that a poor child who had \*served ten years under an indenture of apprenticeship should lose the benefit of his settlement, because the justice's clerk who made the indenture happened to be either ignorant or negligent.” The case there referred to was *Rex v. The Inhabitants of St. Nicholas in Ipswich*, Burr. S. C. 91, 2 Sessions Cases (edit. 1750), 281, 2 Stra. 1066. It was there held that an indenture for less than seven years (as prescribed by the 5 Eliz. c. 4, s. 26) was not void, but only voidable by the parties. That was an extremely strong decision, seeing that the 41st section of the statute enacted "that all indentures, covenants, promises, and bargains of or for the having or taking or keeping of any apprentice otherwise hereafter to be made or taken than is by this statute limited, ordained, and appointed, shall be clearly void in the law to all intents and purposes." In *The King v. The Inhabitants of St. Gregory*, 2 Ad. & E. 99 (E. C. L. R. vol. 29), 4 N. & M. 137 (E. C. L. R. vol. 30),—a case which arose under the very same statute as the case now under consideration,—it was provided by a subsequent section of the Act, that certain guardians of the poor should have power to bind children apprentices, "provided such children be not bound for a longer term than until they shall have attained the respective ages following," viz. a boy the

age of twenty-two, and a girl that of twenty; and it was held that an indenture binding a boy for a longer term than that allowed by the Act was not absolutely void, but only voidable. In *Anonymous*, 1 Salk. 67, it is said that "the justices may force a master to take an apprentice, for, by the statute, the justices are to *put them out*, and therefore must be construed to have consequentially a power to compel the master to receive him." In *Regina v. Gould*, 1 Salk. 381, 6 Mod. 164, Sett. Cas. (1742), 135, an indictment was preferred, "for that a poor boy being *put out* apprentice to the defendant pursuant to \*655] the statute, he *vi et armis* refused to provide for him. Et per Cur. Since we allow the justices power to put out apprentices, we must allow an indictment for disobedience, either in case of not receiving, turning off, or not providing for such apprentices as the law requires; and the *vi et armis* is surplusage." And see *The King v. Clerke*, 2 Show. 193. In *The King v. The Inhabitants of Halesworth*, 3 B. & Ad. 717 (E. C. L. R. vol. 23), lands were devised for the relief of the poor of H., one half of the revenue to be employed for the relief of widows, the other half towards binding out apprentices. The rents were received by the churchwardens, and not mixed with the poor-rates, but kept in a distinct account. A parishioner of H., not receiving parish relief, applied to the churchwardens to provide him with the means of apprenticing his son. The son was apprenticed, and the churchwardens paid the premium, costs of indenture, and expense of clothing the apprentice, out of the charity fund: and it was held that this was not an indenture by which an expense was incurred by *public parochial funds*, within the 56 G. 3, c. 139, s. 11, and therefore not void for want of the approval of two justices according to that statute. And, in a similar case, where lands were devised to the churchwardens and overseers of L. and their successors, upon trust to apply the rents towards educating twenty poor children, and a part thereof yearly towards apprenticing eight of such children, to be chosen out and allowed by the said churchwardens and overseers and the principal inhabitants,—it was held that this also was not a public parochial fund within the meaning of the Act. [WILLIAMS, J.—The apprentices were executing parties there.] They were so. That, no doubt, was necessary at common law. [BYLES, J.—The statute of Elizabeth does not in terms relieve the apprentice from \*656] executing.] The 7 & 8 Vict. c. 101, s. 12, gives power to the guardians to bind without the assent of the justices. That this was not the case of an ordinary parish binding, appears plainly from the statements in the special case. It is submitted, therefore, that the pauper and his children gained a settlement by the father's service under the indenture in question.

ERLE, C. J.—I am of opinion that our judgment should be for the appellants. The question whether an apprentice who has not executed the indenture of apprenticeship is bound at common law, was decided in the negative in the case of *The King v. Arnesby*, 3 B. & Ald. 584 (E. C. L. R. vol. 5). There, the son was taken by his father, and the latter entered into an indenture with the master, under which the son served his time; and it was held that he thereby gained no settlement. Abbott, C. J., says: "The words of the statute of the 3 W. & M. c. 11 are, 'that, if any person shall be bound an apprentice by

indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement.' Before, therefore, any settlement can be gained, the Court must see that the party is bound by indenture. Now, the ordinary mode is, for a party to bind himself by executing the indenture. Even if he does not do that, still, in the special case of a parish apprentice, he may be bound without such execution; but then the binding takes effect by the authority of an Act of Parliament. This, however, is not the case of a parish apprentice; and, unless we were to hold that it is competent for a father to bind his son apprentice without his assent (for which no authority can be produced), we must hold this indenture to be invalid." The apprentice, then, not being duly bound at common law, it remains for us to see if there is anything in the local Act of 1 G. 2, c. xx., to warrant his being bound without his assent. \*The [\*657 43 Eliz. c. 2, s. 5, gave the overseers power to apprentice poor children against their will, and the 56 G. 3, c. 139, s. 11, created a jurisdiction in two justices to allow such indentures; and many conditions were required to be complied with in order to render the indentures valid. Since that, the 7 & 8 Vict. c. 101, s. 12, has substituted the guardians for the overseers, and enables them compulsorily to apprentice poor children without the assent of the justices. The question for our consideration is, whether the 1 G. 2, c. xx., gave power to the guardians of the poor of the city of Canterbury to bind these poor children apprentices, whether they are willing or not, so as to make the indentures in question valid as indentures executed under the authority of the Act of Parliament. The statute, having vested certain lands and tenements in the guardians of the poor of the city of Canterbury, in trust for the advantage, maintenance, and employment of the poor of the said city, by s. 18 enacted that the guardians should give bond "for ever thereafter to provide for, clothe, and maintain sixteen poor boys of the said city, to be called Bluecoat Boys, and furnish them with all manner of necessaries, and an apartment by themselves, separate from the other poor in the said hospital, and cause the said sixteen boys to be instructed in reading, writing, and accounts, and *put them and every of them respectively out apprentices* after they and every of them respectively should have attained their respective ages of thirteen years, and before their said ages of fifteen years, and pay with every such boy so to be put out apprentice the sum of 5*l.*," &c. That appears to me to create a duty in the guardians which would authorize them so to apply the funds,—provided the objects of the charity chose to take advantage of it: but it gives them no power to do so against their will. The guardians have no more authority to bind these boys apprentices against their \*will than [\*658 they would have to take them away from their parents and maintain, clothe, and educate them against their will. Besides, there is another objection, which I should hold to be fatal, even if the guardians *had* the power contended for. They are to apprentice the boys "after they respectively shall have attained their respective ages of thirteen years, and *before their said ages of fifteen years.*" The apprentice in question had at the time he was bound completed his *seventeenth* year. The settlement here depends upon the statute 3 W. & M. c. 11, s. 8; and that confers the settlement only upon an appren-

tice who is *bound* by indenture. The case of *The King v. Arnesby* decides that the apprentice is not bound unless the indenture is executed by him. For these reasons, I am of opinion that no settlement was gained by service under the indenture in question, and consequently that the appellants are entitled to judgment.

WILLIAMS, J.—I am of the same opinion. It is perfectly plain that no father or other person had authority to bind a boy apprentice without his assent. Unless the indenture was executed by the apprentice, it was invalid. The 43 Eliz. c. 2, s. 5, and subsequent statutes, authorized the parish officers, subject to certain conditions, to apprentice poor boys and girls against the will both of the apprentice and of the master. The question here is, whether the local Act of 1 G. 2, c. xx., gave to the guardians of the city of Canterbury a power of that description. It seems to me that no such power is conferred upon them by that Act; and that, if such a power did exist, it was not properly exercised upon this occasion, the apprentice having attained the age of seventeen.

WILLES, J., and BYLES, J., concurring,

Judgment for the appellants.

\*659]

\*SPACKMAN v. MILLER. *June 27.*

W., a trader, by bill of sale, dated the 14th of July, 1856, assigned all his stock and household furniture to the plaintiff as security for an advance of 100*l.* The deed contained a proviso, that, in case W., his executors, &c., should pay to the plaintiff, his executors, &c., the 100*l.* on the 14th of July, 1866, or at such earlier day or time as the plaintiff, his executors, &c., should appoint for payment thereof in and by a notice in writing given to W., his executors, &c., twenty-four hours before the day or time so to be appointed for payment as aforesaid, and should in the mean time pay the interest half-yearly to the plaintiff, his executors, &c., the deed should cease and be void. There was also a covenant by W. for payment of the 100*l.* and interest; and, a further proviso, that, until default should have been made in payment of the 100*l.* at the day appointed for payment, or of the interest, after notice, it should be lawful for W., his executors, &c., to hold, make use of, and possess the goods assigned, without any hindrance or disturbance by the plaintiff, his executors, &c.

W. continued in possession of the goods until the 19th of January, 1862, when he committed an act of bankruptcy. On the 21st, the plaintiff left at his dwelling-house a notice in writing requiring payment of the 100*l.* and interest on the 23d. On the 22d, W. was adjudicated a bankrupt, and on the same day the messenger entered and took possession of the goods:—

Held, that the goods passed to the assignees of W., as goods in his possession, order, and disposition, at the time of the bankruptcy, with the consent of the true owner, within the 125th section of the 12 & 13 Vict. c. 106.

THIS was an action for the conversion of certain goods; and by the consent of the parties, and by a Judge's order, the following case was stated for the opinion of the Court, without any pleadings:—

1. The plaintiff in this action is a grocer at Little Hinton, in Wiltshire. The defendant is the official assignee (duly appointed) of Charles Whiteman, a bankrupt.

2. From the 1st of January, 1855, until the time of his bankruptcy, Whiteman was a grocer at Wanborough, in Wiltshire, and also carried on the business of a carrier.

3. The same business in its several branches had been previously carried on by Whiteman's brother, of whom Whiteman had purchased the good-will, stock in trade, horses, carts, and some household

furniture for 170*l*.: and Whiteman had paid down 70*l*. on taking possession in January, 1855.

4. In June, 1856, the brother required payment of the balance, namely 100*l*.; and Whiteman, being unable to pay the same, applied to the plaintiff, who consented to lend him 100*l*. for the purpose of this payment, on his giving as security a bill of sale of all the horses, carts, and stock in trade with which \*Whiteman then carried on his business, and also of his household furniture. The bill [\*660 of sale was executed by the plaintiff and Whiteman on the 14th of July, 1856 (the day it bears date); and at the time of execution the 100*l*. was paid by the plaintiff to Whiteman, and the 100*l*. was shortly afterwards paid to his brother by Whiteman, in completion of his purchase. The following is a copy of the bill of sale, which was duly stamped and filed under the statute 17 & 18 Vict. c. 36:—

“This indenture, made the 14th of July, 1856, between Charles Whiteman of Wanborough, in the county of Wilts, grocer, of the one part, and Thomas Spackman, of Little Hinton, in the said county, grocer, of the other part: Whereas the said Thomas Spackman, at the request of the said Charles Whiteman, has agreed to lend him the sum of 100*l*., and the said Charles Whiteman has agreed to secure the repayment of the same with interest to the said Thomas Spackman by the assignment and in the manner hereinafter appearing: Now this indenture witnesseth, that, in consideration of the sum of 100*l*. paid by the said Thomas Spackman to the said Charles Whiteman at or before the execution of this indenture, the receipt of which sum the said Charles Whiteman hereby acknowledges, and discharges the said Thomas Spackman, his executors, administrators, and assigns, from the payment thereof, he the said Charles Whiteman doth by this present indenture bargain, sell, and assign unto the said Thomas Spackman, his executors, administrators, and assigns, all and every the goods, chattels, implements, utensils, and things which are now in, about, and belonging to the dwelling-house, shop, stables, out-buildings, yards, gardens, and land of the said Charles Whiteman, situate and being at Wanborough aforesaid, now in his occupation; and all the \*right, title, interest, property, claim, and demand [\*661 of the said Charles Whiteman to, in, and upon the said goods, chattels, and premises, and every part thereof, to have, take, receive, and enjoy the goods, chattels, and premises expressed to be hereby assigned unto the said Thomas Spackman, his executors, administrators, and assigns, as his and their own property and effects: Provided, nevertheless, that, in case the said Charles Whiteman, his executors or administrators, shall well and truly pay or cause to be paid unto the said Thomas Spackman, his executors, administrators, or assigns, the said sum of 100*l*. on the 14th of July, 1866, or at such earlier day or time as the said Thomas Spackman, his executors, administrators, or assigns shall appoint for payment thereof in and by notice in writing to be given to the said Charles Whiteman, his executors or administrators, or left at his or their usual or last-known place of abode in England *twenty-four hours before the day or time so to be appointed for payment as aforesaid*, and do and shall in the mean time until the repayment of the said principal sum of 100*l*. at either of the periods aforesaid, well and truly pay or cause to be paid unto the said Thomas Spackman, his executors, administrators, or assigns, interest

thereon at the rate of 5*l*. per centum per annum, by equal half-yearly payments, on the 14th of January and the 14th of July in every year, and also a proportional part of such interest for the fractional period of the half-year (if any) which shall elapse between the last half-yearly day of payment and the expiration of the notice so to be given by the said Thomas Spackman, his executors, administrators, or assigns, for the payment of the said principal sum of 100*l*. as aforesaid, such proportional part to be paid immediately on the expiration of such notice, and such several payments to be made without any \*662] deduction \*or abatement whatsoever; and in case the said Charles Whiteman, his executors, administrators, or assigns, shall pay the costs and expenses of any sale which the said Thomas Spackman, his executors, administrators, or assigns, shall or may have begun or made in exercise of the power of sale hereinafter contained, —then and in such case this present indenture, and every power and provision herein contained, shall cease and be void: And the said Charles Whiteman, for himself, his executors and administrators, doth hereby covenant, promise, and agree to and with the said Thomas Spackman, his executors, administrators, and assigns, that he the said Charles Whiteman, his executors, administrators, or assigns, will, after notice given by the said Thomas Spackman, his executors, administrators, or assigns, according to the terms of the proviso for making void the present indenture hereinbefore contained, well and truly pay or cause to be paid unto the said Thomas Spackman, his executors, administrators, or assigns, the said sum of 100*l*. and interest thereon at the rate of 5*l*. per centum per annum, and, until such demand shall be made, will pay interest to the said Thomas Spackman, his executors, administrators, or assigns, at the rate of 5*l*. per centum per annum, by equal half-yearly payments, on the 14th of January and 14th of July in every year: Provided also, and it is hereby also declared and agreed, that, after default shall be made by the said Charles Whiteman, his executors or administrators, in payment of the said sum of 100*l*. and interest, or any part thereof, contrary to the tenor and effect of the before-mentioned proviso, and in respect of the said interest, after notice shall have been given by the said Thomas Spackman, his executors, administrators, or assigns, to the said Charles Whiteman, his executors or administrators, or left for him or them at his or their \*663] \*usual place or places of abode, requiring the payment of such interest, —then and in such case it shall be lawful for, and the said Charles Whiteman doth hereby empower, the said Thomas Spackman, his executors, administrators, or assigns, without any interruption by him the said Charles Whiteman, his executors or administrators, to seize and take possession of all and every the goods, chattels, and premises expressed to be hereby assigned, and of all goods, chattels, utensils, implements, and things which from time to time shall or may have been substituted in lieu of the said goods, chattels, and premises expressed to be hereby assigned, or any part thereof, or which shall for the time being be found in or about the said dwelling-house, shop, stables, outbuildings, yards, gardens, and lands at Wanborough aforesaid, either in the lifetime of the said Charles Whiteman or after his decease; and also to sell and dispose of all and singular the said several goods, chattels, and premises by public auction or private con-

tract, and either together or in several lots, with full power to buy in the same or any part thereof at any auction, and to resell the same, without being liable for any loss or deficiency consequent on such resale, and to receive and take the moneys to arise by such sale thereof, and therewith in the first place to retain to and reimburse himself and themselves the said Thomas Spackman, his executors, administrators, or assigns, all costs, charges, and expenses which he or they may incur or be put unto in and about making any such sale or sales, and also in and about the receipt and recovery of the said sum of 100*l.* and interest respectively; and in the next place to retain to and repay himself and themselves the said Thomas Spackman, his executors, administrators, or assigns, the said sum of 100*l.*, and the interest thereon, or so much thereof as shall then remain \*unpaid; and, [\*664 from and after full payment and satisfaction of such costs, charges, and expenses, sum and sums of money as aforesaid, to pay the surplus (if any) of the money arising from such sale or sales as aforesaid unto the said Charles Whiteman, his executors, administrators, or assigns: Provided also, and it is hereby declared and agreed, that, until default shall have been made in payment of the said sum of 100*l.* at the day or time hereinbefore appointed for payment thereof, contrary to the tenor and effect of the proviso hereinbefore contained, or until default shall be made in payment of the interest of the said principal sum, or some part thereof, on some or one of the days or times hereinbefore appointed for payment thereof, contrary to the same proviso, and until in respect of the said interest notice shall be given by the said Thomas Spackman, his executors, administrators, or assigns, unto the said Charles Whiteman, his executors or administrators, or left for him or them at his or their usual or last-known place or places of abode in England, requiring the payment of such interest, it shall be lawful for the said Charles Whiteman, his executors or administrators, to hold, make use of, and possess the goods, chattels, and premises hereby assigned or intended so to be, without any manner of hindrance or disturbance by him the said Thomas Spackman, his executors, administrators, or assigns. In witness," &c.

5. The plaintiff never took possession of any of the goods, chattels, or effects comprised in the said bill of sale: and the said Charles Whiteman continued in the actual possession and apparently in the ownership of the same up to and at the time of his being adjudicated a bankrupt, as hereinafter mentioned.

6. At the date of the bill of sale, the bankrupt owed his father 80*l.*, money which he had borrowed in \*January, 1855, and has never repaid: but, at the time of the execution of such bill of sale, [\*665 with the exception of this debt, Whiteman's liabilities were but little.

7. Whiteman carried on the said business from January, 1855, at the dwelling-house mentioned in the bill of sale, until the 19th of January, 1862, when, being largely indebted, and unable to meet his creditors, he suddenly absented himself therefrom, with intent to defeat or delay his creditors, and did not return thereto until some days after he had been adjudicated bankrupt.

8. On the 21st of January, the plaintiff heard that Whiteman had so absented himself, and with such intent as aforesaid; and, on the same day, he caused a notice requiring payment of his debt and inte-

rest to be read over and given to Whiteman's wife, at the said dwelling-house.

The following is a copy of such notice:—

"To Charles Whiteman, of Wanborough, in the county of Wilts, grocer, and all others whom it may concern:—

"I, the undersigned, Thomas Spackman, of Little Hinton, in the county of Wilts, grocer, hereby give you the said Charles Whiteman notice that I do hereby require payment to be made to me, on the 23d of January instant, of the principal sum of 100*l.* secured to me by your indenture dated the 14th of July, 1856, and of the interest on such principal sum from the 14th of July last, at the rate of 5*l.* per centum per annum: And I do further give you notice, that, if default be made in payment of the said principal sum and interest, I shall proceed to exercise all the rights, powers, and remedies given to me by the said indenture for raising and paying the said principal sum and interest. Witness," &c.

(Signed)

"THOMAS SPACKMAN."

\*666] \*9. On the same 21st of January, the plaintiff himself went to Whiteman's house, and took an inventory of all goods and things in and about the said house and premises.

10. On the 22d of January, Whiteman was duly adjudicated a bankrupt, upon the act of bankruptcy by absenting himself as aforesaid, and on the petition of William Brind, a creditor: and, on the same day, possession of all the goods and effects in and about the said dwelling-house and premises was taken by the messenger of the Bristol District Court of Bankruptcy on behalf of the defendant as the official assignee appointed under the bankruptcy.

11. At the time of the bankruptcy only a part of the goods actually assigned by the bill of sale remained on the bankrupt's premises; the rest having from time to time been previously disposed of and removed by the bankrupt: and it is in respect of such part of the goods assigned and so remaining on the premises that the present action was brought, and the plaintiff's claim arises. The plaintiff does not claim any fixtures by the bill of sale.

12. On the 31st of January, a written notice of demand by the plaintiff of the goods and things actually assigned and so remaining (which were particularized in such notice), was served on the messenger of the Court of Bankruptcy, so in possession as aforesaid of the bankrupt's estate: and, on the 1st of February following, a like notice was served on the defendant.

13. On the 30th of January, the goods assigned and so remaining were advertised for sale by the defendant. On the 3d of February, an order of the Court of Bankruptcy was duly obtained by the defendant under the 125th section of the Bankrupt Law Consolidation

\*667] Act, 1849, for the sale of these goods for the benefit of \*the creditors under the bankruptcy, as being goods which the bankrupt at the time he became bankrupt had by the consent and permission of the true owner in his possession, order, and disposition, and whereof he was reputed owner; and the same goods were afterwards accordingly sold by the defendant on the 4th of the same month of February, and realized the sum of 60*l.*, which sum by agreement between the parties was for the purpose of this case to be considered as

remaining in the hands of the defendant to abide the decision upon this case.

The Court was to be at liberty to draw all inferences which a jury might draw.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in this action.

If the Court should be of opinion that the plaintiff was entitled to recover in this action, judgment was to be entered for him for the sum of 60*l.*, with costs. If the Court should be of opinion that the plaintiff was not entitled, judgment of non-pros was to be entered, with costs.

*Macnamara* (with whom was *Karslake*, Q. C.), for the plaintiff.—It is submitted, that, under the circumstances stated in this case, the property in question did not pass to the assignee, the bankrupt not being at the time of his bankruptcy in possession of them as reputed owner within the 125th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), which remains unaltered by the Bankruptcy and Insolvency Act, 1861, 24 & 25 Vict. c. 134. The cases upon that section have always supposed that there was a reputed as contradistinguished from the true owner. In *Ex parte Dale*, in re Barker, Buck, B. C. 365, the Vice-Chancellor (Sir John Leach) defines the "true owner" to be "the person who has the legal \*right to the possession and the power of dealing with the property," [\*668 It necessarily implies that there should be a true owner by whose consent another is left in possession of the property at the time of the bankruptcy. The deed in question amounts to a re-demise; and Whiteman was in fact a termor of the goods, his rights as such being defeasible on the happening of certain events mentioned in the bill of sale. During the subsistence of the term, Whiteman was the true owner, the plaintiff having only a reversionary interest. The case of *Fenn v. Bittleston*, 7 Exch. 152,† is quite decisive. There A., by deed dated the 28th of September, 1845, conveyed certain goods to B., subject to a proviso, that, if he should pay B. the sum thereby secured on the 22d of March, 1850, or at such earlier day or time as B. should appoint by giving B. fourteen days' notice, and should pay interest in the mean time half-yearly, the conveyance should be void; and it was thereby agreed between the parties, that, until default should be made in the payment of the principal sum secured at the time therein specified, or the interest fourteen days after notice, it should be lawful for A., his executors or administrators, to hold and enjoy the chattels. A. continued in possession of the chattels according to the agreement until the 13th of December, 1849, when he became bankrupt; and his assignees (the defendants), on the 19th of February, 1860, sold the whole of the chattels absolutely, and not merely the bankrupt's interest in them. No demand had been made on A. by B., or by the plaintiff (the assignees of B.), for the principal money or interest in the mean time. And it was held,—first, that the deed did not give a mere possession and use of the goods to A. as bailee or tenant at will, but the right of possession and use for the term ending the 22d of March, 1850, defeasible by non-payment of \*the principal or of the interest according to the terms of the deed,—but, secondly, that [\*669 the sale by the assignees of A., the bankrupt, destroyed the bailment,—and, thirdly, that the sale by the assignees was equivalent to a sale

by the bailee himself, and consequently that trover would lie by the assignees of the mortgagee against the assignees in bankruptcy of the mortgagor, for the conversion by the goods during the term. That case distinctly shows that there was a term in the mortgagor, during the subsistence of which the assignees had no right to take the goods, as being in the possession, order, or disposition of the bankrupt as reputed owner. Parke, B., in giving judgment, there says: "We think that the effect of the agreement of the parties in this case was, to give not a mere possession and the use of the chattels to Malpas as a bailee, but the right of possession and use for the term ending the 22d of March, 1850, defeasible by non-payment of the principal on fourteen days' notice, and non-payment of the interest in the mean time. The duration of the time of holding was not uncertain, as it would have been had it been only until such notice had been given; and in that case it might have been a term for life (which would not be so in the case of a demise of land, for want of livery of seisin). But it has a certain limit which it cannot exceed, viz. the 22d of March. It is therefore good as a grant of a term defeasible, as suggested by Mr. Preston in his commentary on the passage in Sheppard's Touchstone 272. It is too late to contend that the provision as to possession was a mere covenant, after the cases on the subject, concluding with *Bradley v. Copley*, 1 C. B. 699 (E. C. L. R. vol. 50)." There are numerous cases to the same effect. [WILLIAMS, J., referred to *Freshney v. Carrick*, 1 Hurlst. & N. 658.† There, a trader by deed assigned his goods by way of mortgage, subject to a proviso that it \*670] should be lawful \*for him to hold and make use of the goods until default in payment of the money secured, *after demand in writing*: the mortgagee having allowed the trader to continue in possession of the goods until after his bankruptcy,—it was held that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt with the consent of the true owner, within the meaning of the 125th section of the Bankrupt Law Consolidation Act, 1849.] There the money was payable on *demand*. That is the distinction. Here, a term is created, defeasible on a twenty-four hours' notice,—precisely as in *Fenn v. Bittleston*. This is rather within the case of *Muller v. Moss*, 1 M. & Selw. 335. There, by agreement between B. and the defendant, B. agreed, on payment to him of a sum certain, to convey to the defendant a dwelling-house, and to deliver possession of all the household furniture and stock, and that, after formal possession delivered to the defendant, B. should be allowed to remain in possession for three months without paying rent (which agreement was notorious in the neighbourhood), and the money was paid by the defendant, and a formal delivery made to him, and B. was afterwards left in possession according to the agreement. B. became bankrupt whilst he so remained in possession, and before the expiration of the three months: and it was held that this was not a possession by the bankrupt within the 1 Jac. 1, c. 19, s. 7. "It was a part of the contract," said Lord Ellenborough, "that the bankrupt should remain in possession during the three months; therefore, during that period, he was in possession of his own right, as owner, and not by permission of the true owner: and, as to his being reputed owner, the case states that the transfer was notorious. No person was deceived. Besides, reputed ownership is a fact which ought to have

been found, to raise the \*question at all. It might have been a very different thing if the bankrupt had retained the possession without its being a part of the contract." The Courts have manifestly been less willing to extend the construction of the reputed ownership clause since the passing of the Act for the registration of bills of sale, 17 & 18 Vict. c. 36. [\*671]

*Prideaux* (with whom was *Montague Smith*, Q. C.), contra.—The only question is, whether the bankrupt was at the time of his bankruptcy in the reputed ownership of these goods with the consent of the true owner. There is a marked distinction between *Fenn v. Bittlestone* and the case now under consideration. There, the question of reputed ownership did not arise at all. Bankruptcy was a link in the title, but no element in the decision. All that the case decided was, that, where there is an assignment of goods, and a covenant that the assignor shall be entitled to the enjoyment of the goods until the happening of a certain event, the assignee cannot maintain trover for them until that event has happened, that the sale by the assignees in bankruptcy was such a violation of the terms of enjoyment stipulated for by the deed as to destroy the right of enjoyment by the assignor, and to entitle the assignee under the deed to maintain trover. It is impossible to distinguish this case from *Freshney v. Carrick*, 1 Hurlst. & N. 653.† *Pollock*, C. B., there says: "The plaintiffs, by agreeing to leave the bankrupt in possession of the goods, did not prevent their passing to the assignees as having been in the order and disposition of the bankrupt with the consent of the true owner, and the assignees were justified in treating them as having passed under the fiat." And *Martin*, B., says: "The object of the Act is, that, if the owner permits another person to have possession as \*reputed owner, he must take the consequences of it, and in the event of bankruptcy, the creditors become entitled to the goods." In all these cases, the assignee and not the assignor is the true owner within the 125th section of the Bankrupt Act: the only right which the assignor has is, the right of enjoyment until the happening of a given event, whether on demand or on notice. [*Kemplay*, *Amicus Curie*, said that he had been informed by the late Mr. Cowling, that, in *Fenn v. Bittlestone*, the question of reputed ownership went to the jury, and they negatived it. *WILLES*, J.—The question, therefore, in that case may be considered as free from the reputed ownership point. *WILLIAMS*, J.—That accounts for that which is otherwise inexplicable in that case.] In *Reynolds v. Hall*, 4 Hurlst. & N. 519,† a trader executed a bill of sale of his stock in trade and all his other effects to the defendant, an auctioneer. On the 17th of June, in pursuance of an arrangement between the parties, the defendant came on the premises of the trader and attempted to sell the goods, but there were no buyers, and nothing was sold. The defendant then left the premises, and the trader remained there, and continued to carry on business till the 22d, when he committed an act of bankruptcy. The sale had been advertised, but it did not appear that the goods were advertised to be sold as the goods of the defendant. And it was held, that, notwithstanding the attempted sale, the goods were in the possession of the bankrupt as reputed owner with the consent of the true owner at the time of the bankruptcy, and therefore passed to his assignees. "The goods," said

Bramwell, B., "continued in the house, the bankrupt carrying on business and dealing with them. Their being in the house was the act of the true owner; and therefore they were in the order and dis-  
\*673] position of the bankrupt with the consent of the \*true owner."

And Channell, B., said: "The advertisement of sale did not destroy the apparent ownership, and was no withdrawal of the defendant's consent to its continuance." So, in *Hornaby v. Miller*, 1 E. & E. 192 (E. C. L. R. vol. 102), L. bought of the plaintiffs, agricultural implement makers, a portable steam-engine, paid part of the price, and, to secure the balance, executed a deed, by which he assigned the engine to the plaintiffs by way of mortgage, with power to the plaintiffs to enter upon the premises of L. or any other place where the engine might be, and take the same, as effectually as L. could do, and also in the name of L. to sue for and recover it,—habendum to the plaintiffs, in trust, when they should think proper, to take actual possession of and sell the engine, and, after paying expenses, principal, and interest, to pay the surplus to L., with a proviso, that, in default of payment of principal and interest upon demand in writing signed by the plaintiffs, the plaintiffs might possess the engine; and that, if L. before such sale should pay the principal, interest, and expenses, the deed should be void. There was also a covenant by L. to pay principal and interest on demand. The deed was registered under the 17 & 18 Vict. c. 36. L. was notoriously in the habit of receiving and having on his premises implements from the makers, and disposing of them on account of the makers, on commission. He took possession of the engine, and was in the habit of letting it out to hire in the way of his trade. He became bankrupt at a time when the engine was in possession of a farmer, to whom it had been so let by him on hire. At that time, no written demand had been made on L. by the plaintiffs for payment. The defendants, as assignees under the bankruptcy, took possession of the engine, as being in the possession,  
\*674] order, and disposition of L. at the time \*of his bankruptcy, with the consent of the true owner, and sold it under an order of the Court of Bankruptcy. It was held that they were justified in so doing. Lord Campbell there says: "Mr. Karslake admits the authority and applicability of *Freshney v. Carrick*; and the only distinction suggested between that case and the present, is, that here the actual possession of the chattel was not in the hands of the bankrupt, but in those of the farmer to whom he had let it. That I do not think a sufficient distinction. I do not throw any doubt on the other cases which have been cited for the plaintiffs, where a third party had a legal right to the possession. But, what was the chattel here, and what use was made of it? It was a portable chattel, to be let out, and returned to the party letting it. That would strengthen the belief that the party letting was the actual owner. If we are to adhere to the decision of *Freshney v. Carrick*, we must give judgment for the defendants." These three cases, it is submitted, are quite decisive of the question. [WILLES, J.—The effect of the deed here is, a mortgage of the goods, and a re-demise until the 14th of July, 1866, subject to its being put an end to in the mean time by a twenty-four hours' notice. The matter was very much discussed in *Lingham v. Biggs*, 1 Bos. & P. 82. There, the furniture of a coffee-house keeper was taken

in execution by a creditor, and, without ever being removed, was let by him to the coffee-house keeper, who became bankrupt while in possession of it: and it was held that the assignees might seize it, under the 21 Jac. 1, c. 19, s. 11. So, in *Clark v. Crownshaw*, 3 B. & Ad. 804 (E. C. L. R. vol. 23), L. took a lease of a mill and forge, and bought the fixed and movable implements, &c., but it was agreed that they should be delivered up at the end or other determination of the term, at a valuation, if the lessors should give fifteen \*months' notice of their desire to have them. L. afterwards conveyed all his [\*675 interest in the premises, implements, &c., to a creditor, in trust, if default should be made by L. in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds; re-assigning the residue; and, if the lessors should require a resale of the implements, &c., the proceeds of such resale were to go in discharge of the debt, if unsatisfied. L. made default, and subsequently became bankrupt, after which, and during the term, the creditor, who had not before interfered, entered upon the property. On trespass brought by the assignees, it was held that L. had at the time of his bankruptcy the reputed ownership of the movable goods, but not of the fixtures: and Parke, J., said: "On the default made by the bankrupt, the defendant should have given notice, and entered pursuant to the deed; but, instead of doing so, he allowed L. to retain the apparent ownership, and the right of the assignees by relation had attached before the defendant entered." The circumstance of a specific time being mentioned can make no difference, so long as the mortgagor is allowed to remain in possession of the goods. And the principle is the same whether there be a redemise or not. This is the very case contemplated by the statute.

*Macnamara*, in reply.—The cases of *Lingham v. Biggs* and *Clark v. Crownshaw* were decided at a time when it was supposed that there could not be a term created in goods. It was not until the case of *Bradley v. Copley*, 1 C. B. 615 (E. C. L. R. vol. 50), that that was considered settled. *Fenn v. Bittleston* has not been successfully distinguished. [WILLIAMS, J.—There was a redemise in *Freshney v. Carrick*, only defeasible on the happening of another event.] No term was \*created there, as there was in *Fenn v. Bittleston*. [WILLES, [\*676 J.—There is a case of *Bryson v. Wylie*, in a note to *Lingham v. Biggs*, 1 B. & P. 83, which seems to me to be precisely in point. There, one Simpson, being possessed of a dyer's plant, assigned it by deed to the plaintiff in satisfaction of a debt; and the plaintiff then by the same deed let the plant to Simpson for three years, Simpson paying the plaintiff 8*l.* 5*s.* 6*d.* per annum for the use thereof, and observing the covenants respecting the same,—covenants from Simpson for paying the rent quarterly, for keeping the plant in repair, and against assigning without the consent of the plaintiff: and it was agreed, that, if Simpson should make default in any of the quarterly payments, or in the performance of any of the other covenants, the term granted should cease, and Simpson should deliver the plant, &c., and it should be lawful for the plaintiff to take immediate possession of the same. The question for the opinion of the Court was, whether the case was within the statute 21 Jac. 1, c. 19, s. 11. And Lord Mansfield said: "I have no doubt that this is a new experiment to

defeat the bankrupt laws. The law has said that a trader cannot mortgage his effects, and at the same time keep possession. What is the case here? He sells and keeps possession, and pays interest for the money. If this contrivance were suffered, it would open a door to avoid the statute, and therefore it ought not to be allowed to prevail.]

WILLIAMS, J.—I am of opinion that our judgment in this case ought to be for the defendant. Several cases have been cited by Mr. *Macnamara*, and especially the case of *Fenn v. Bittleston*, 1 Hurlst. & N. 658,† which certainly sustain the proposition, that, at the time when \*677] this bankruptcy took place, the position of the \*bankrupt, the mortgagor of these chattels, and of the plaintiff, the mortgagee, was such that the mortgagee could not have maintained trespass or trover in respect of these goods, but that, on the contrary, the bankrupt himself might have maintained an action against any person interfering with his possession. That proposition is fully made out by the case of *Fenn v. Bittleston*, and is further established by *Brierly v. Kendall*, 17 Q. B. 937 (E. C. L. R. vol. 79). There, by indenture of sale, A. assigned all his household goods, &c., to secure a debt due from him to the assignees, subject to a proviso that the deed should become void upon payment of the said sum on a certain day, or on some earlier day to be appointed by the assignees by a notice in writing to be served on A. twenty-four hours before the day of payment so appointed; interest to be paid in the mean time. It was also agreed by the deed, that, after default made in payment, contrary to the said proviso, it should be lawful for the assignees to enter and take possession of the goods, and to sell them and reimburse themselves out of the proceeds, accounting to A. for any surplus; and that, until such default, it should be lawful for A. to hold, use, and possess the said goods, without hindrance from the assignees. The assignees served A. with a notice to pay on a day earlier than that named in the deed, and afterwards entered and took, and sold the goods assigned; but the notice was bad, having been served less than twenty-four hours before the day of payment appointed by the assignees. And it was held, on the authority of *Fenn v. Bittleston*, that A. had, under the deed, the right of possession of the goods, defeasible only by default in payment after due notice; and that he might therefore sue the assignees in trespass for having wrongfully entered and sold. The deed there was almost in the very words of the deed in this case; and \*678] the circumstances were very much the same, only there was no bankruptcy. There is very good ground, therefore, for arguing, that, inasmuch as the legal right of possession was in the bankrupt at the time of the bankruptcy, there is a difficulty in saying that the bankrupt had the goods in his possession, order, and disposition with the consent of the true owner, because in truth he held them as of right by virtue of the proviso in the mortgage-deed. Looking at the language of the 125th section of the Bankrupt Act, there certainly is ground for saying that the present case does not fall within it. But it seems to me that the authorities cited in the course of the argument by Mr. *Prideaux* establish this, that the law will not allow a person who takes a bill of sale or mortgage of chattels to suffer the grantor or mortgagor to continue in the apparent ownership of them,

without incurring the risk of their passing to his assignees in the event of a bankruptcy; and that he cannot prevent that effect by introducing into the deed a clause of redemise to the mortgagor. That, I think, may fairly be inferred to be the principle upon which the cases of *Freshney v. Carrick* and *Hornsby v. Miller* were decided. But the case last referred to by my Brother Willes, *Bryson v. Wylie*, is directly in point, and is altogether undistinguishable from the present both in its facts and in principle. It shows that the law will not allow this provision of the Bankrupt Act to be defeated by this sort of contrivance. And in this there is plainly good sense, because where the mortgagee might at any time repossess himself of the goods upon giving twenty-four hours' notice, and does not choose to avail himself of that power, the goods are in substance in the possession of the bankrupt with the consent and permission of the true owner. And it is clear that such a case involves the very mischief which is pointed \*at by the 125th section of the Bankrupt Act, viz. the permitting the bankrupt to hold out a false and delusive credit [\*679 to the world.

WILLES, J.—I am of the same opinion. This case has been argued with much ingenuity. Mr. *Macnamara* has endeavoured to prove that there was no real owner here, as contradistinguished from the reputed owner, by whose consent and permission the goods were in the possession, order, and disposition of the bankrupt at the time of his bankruptcy. But the true meaning of the argument is, that there could be no consent of the real owner, because a man cannot be said to consent who has not the power of dissenting. Taking the deed as it stands, the creditor in a certain sense had not the power to dissent from the possession being in the mortgagor: that is, unless he knew for certain twenty-four hours before that there would be an act of bankruptcy, he had no opportunity of exercising the power given to him by the deed. But he had all the time from the execution of the bill of sale to within twenty four hours of the bankruptcy to acquire possession of the goods by giving notice. It is, however, too late now to contend that a mortgagee of chattels who redemises them to the mortgagor is not to be taken to be the true owner within the reputed ownership clauses of the various Bankrupt Acts from the 21 Jac. 1, c. 19, downwards. That question was settled by Lord Mansfield and Mr. Justice Buller, after an argument by Lord Ellenborough on the one side, and Mr. Baron Wood on the other (both then at the bar), in *Bryson v. Wylie*, 1 B. & P. 83 n., and by Lord Chief Justice Eyre in *Lingham v. Biggs*, 1 B. & P. 82: and it is quite too late now to attempt any reconsideration of the matter. These cases are \*cited in the text-books on the law of bankruptcy of the present day as [\*680 subsisting authorities.(a) They also show this, that it is indifferent whether the acquisition of the goods and the redemise are one transaction or are effected by different instruments.

KEATING, J.—I am of the same opinion. The authorities clearly show, that, to give effect to a redemise of this sort, would be to defeat entirely the reputed ownership clause in the Bankrupt Act. That

(a) See Cook's Bankruptcy Law 362; Archbold's Bankruptcy Law, 9th ed., by Flather, 220; Shelford's Bankruptcy Law 250, 258, 262.

was the ground upon which the cases referred to by my Brother Willes were decided.

BYLES, J., not having heard the whole of the argument, expressed no opinion. Judgment for the defendant.

\*681]

\*GOSLIN v. CLARK. *June 26.*

A decree of dissolution of marriage by the Divorce Court, on the ground of adultery, is no answer to an action by the wife's trustee upon a covenant by the husband to pay her an annuity, contained in a deed of separation which recites the wife's acknowledgment of the adultery, which was afterwards made the foundation of the suit in the Divorce Court.

THE declaration stated that the defendant by deed covenanted with the plaintiff that he the defendant, his executors or administrators, or some or one of them, should and would from time to time, yearly and every year during the natural life of one Ann Elizabeth Clark, well and truly pay or cause to be paid unto the said Ann Elizabeth Clark, her executors, administrators, or assigns, one annuity or clear yearly sum of 100*l.* of lawful money current in Great Britain, by equal half-yearly payments on the 9th of November and the 9th of May in every year, without any deduction or abatement on any account whatsoever, and should and would make the first half-yearly payment thereof on the 9th of November, 1852: Provided always, that, if the said Ann Elizabeth Clark, or any person or persons with her privity or on her behalf, should molest or annoy, or cause any molestation or annoyance to, the defendant or any of his relations or friends, either by personal communication or by letter, or otherwise, or if the said Ann Elizabeth Clark should at any time thereafter have illicit intercourse with any person or persons, or should not live or conduct herself as a chaste and modest woman ought to do, or if the said Ann Elizabeth Clark should encumber or assign the growing payments of the said annuity, or do any act, matter, or thing whatsoever whereby or in consequence of which, or whether by her own act or the act or operation of law, she should be deprived of or cease to be entitled to the actual and beneficial receipt and enjoyment of the said annuity, then and in either of the said cases, and thenceforth, the said annuity or yearly sum of 100*l.* should cease and be determined in like manner in all

\*682] respects and to all intents and purposes \*as if the said Ann Elizabeth Clark had actually departed this life: Provided also, that, if the defendant should, in manner in the said deed more particularly mentioned, purchase and transfer into the names of such trustees as therein are specified such three per cent. Consolidated or three per cent. Reduced Annuities as therein mentioned, and cause such declaration as therein mentioned to be executed, or if the defendant should at any time thereafter pay to the said Ann Elizabeth Clark the sum of 1500*l.*, then and in any or either of the said cases the said covenant should cease and determine: Averment, that, although the said Ann Elizabeth Clark was still living, and all conditions precedent were performed and fulfilled by the plaintiff and the said Ann Elizabeth Clark respectively, and all things happened and were done,

and all times elapsed, necessary to entitle the said Ann Elizabeth Clark to the said annuity, and the plaintiff to a performance of the said covenant of the defendant, which still remained in full force, and to maintain this action for the breach thereof thereafter alleged, and nothing was done or happened to disentitle the said Ann Elizabeth Clark to the said annuity, or the plaintiff to such performance as aforesaid, or from maintaining this suit,—Yet the defendant made default in payment to the said Ann Elizabeth Clark of one of the said half-yearly instalments of the said annuity, and 50*l.*, being the amount of the said half-yearly payment, remained and was due and unpaid. And the plaintiff claimed 100*l.*

The defendant,—for a defence on equitable grounds,—said that the said deed in the declaration mentioned was and is in the words and figures following, that is to say,—“This indenture, made the 30th of June, 1852, between Frederick James Clark, of, &c., of the first part, Ann Elizabeth Clark, the wife of the said \*Frederick James Clark, of the second part, John Goodrick Goslin, &c., the father of the said Ann Elizabeth Clark, of the third part: Whereas, the said Frederick James Clark hath lately discovered that the said Ann Elizabeth Clark, his wife, hath been, as she doth hereby admit, guilty of adultery with J. S., and he hath therefore separated himself from her and determined to put an end to all intercourse between them for the future: And whereas, for the purpose of making some provision for the support and maintenance of the said Ann Elizabeth Clark, the said Frederick James Clark hath determined to allow her an annuity or yearly sum of 100*l.* during her life, upon the terms hereafter expressed, and for that purpose, and in consideration of the covenant hereinafter contained on the part of the said John Goodrick Goslin to indemnify him from the future debts and liabilities of the said Ann Elizabeth Clark, he hath agreed to enter into the covenant hereinafter contained: Now this indenture witnesseth, that, for the purpose of carrying his said recited determination into effect, and for and in consideration of the premises, he the said Frederick James Clark doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said John Goodrick Goslin, his executors, administrators, and assigns, that he the said Frederick James Clark, his executors or administrators, or some or one of them, shall and will from time to time, yearly and every year during the natural life of the said Ann Elizabeth Clark, well and truly pay or cause to be paid unto the said Ann Elizabeth Clark, her executors, administrators, or assigns, one annuity or clear yearly sum of 100*l.* of lawful money current in Great Britain, by equal half-yearly payments, on the 9th of November and the 9th of May in every year, without any deduction or abatement on any account whatsoever, and \*shall and will make the first half-yearly payment thereof on the 9th of November now next ensuing: Provided always, that, if the said Ann Elizabeth Clark, or any person or persons with her privity or on her behalf, shall molest or annoy, or cause any molestation or annoyance to the said Frederick James Clark or any of his relations or friends, either by personal communication or by letters, or otherwise, or if the said Ann Elizabeth Clark shall at any time hereafter have illicit intercourse with any person or persons, or shall not live or conduct

herself as a chaste and modest woman ought to do, or if the said Ann Elizabeth Clark shall charge, encumber, or assign the growing payments of the said annuity, or do any act, matter, or thing whatsoever whereby or in consequence of which, and whether by her own act or the act or operation of the law, she shall be deprived of or cease to be entitled to the actual and beneficial receipt and enjoyment of the said annuity, then and in either of the said cases, and thenceforth, the said annuity or yearly sum of 100% shall cease and be determined, in like manner in all respects and to all intents and purposes as if the said Ann Elizabeth Clark had actually departed this life: And, for the considerations aforesaid, the said John Goodrick Goslin doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said Frederick James Clark, his executors and administrators, that the said Ann Elizabeth Clark shall not, nor shall any person or persons on her behalf or with her consent, at any time or times hereafter commence or prosecute any suit or suits in any Court or Courts whatsoever to enforce the said Frederick James Clark to cohabit with her or to compel him to make her any allowance for alimony or maintenance beyond the provision \*685] hereby made for her; and, further, that he the \*said John Goodrick Goslin, his heirs, executors, or administrators, shall and will from time to time and at all times for ever hereafter save, defend, keep harmless, and indemnified the said Frederick James Clark, his heirs, executors, and administrators, and every of them, and his, their, and every of their estate and effects whatsoever, of, from, and against all and every debt and debts which shall or may be contracted by the said Ann Elizabeth Clark on any account or pretence whatsoever, and of and from all actions, suits, claims, and demands whatsoever on account of the same, or any part thereof: Provided always, and it is hereby expressly agreed and declared, that, if the said Frederick James Clark shall at any time or times hereafter be obliged to pay, and shall actually pay or discharge, any debts or liabilities which the said Ann Elizabeth Clark, his wife, shall at any time or times hereafter contract with any person or persons, then the said John Goodrick Goslin shall and will repay or make good to the said Frederick James Clark, his executors, administrators, and assigns, all and every the sum and sums of money which he or they shall so pay as aforesaid on account of any such debts or liabilities as aforesaid, together with all such costs, charges, damages, and expenses as he or they shall incur or sustain on account thereof: Provided always, that, if the said Frederick James Clark, his heirs, executors, or administrators, shall at any time during the continuance of the said annuity of 100% purchase in the name of any two or more trustees of his or their own nomination a government life-annuity of equal amount; or shall purchase or transfer, or cause to be purchased or transferred, unto or into the names of such two or more trustees as aforesaid a sum of three per cent. Consolidated or three per cent. \*686] Reduced Annuities, the dividends or income of which shall be \*sufficient to answer such annuity, and shall at his or their own costs and charges cause a declaration of the trusts of the government life-annuity so to be purchased, or of the stocks so to be purchased or transferred, as aforesaid, to be executed by such trustees as aforesaid, for securing to the said Ann Elizabeth Clark the said annuity for the

same term or period, and to determine in the same manner and in the same event or events as the said annuity is to determine as aforesaid, and, subject thereto, upon trust for him the said Frederick James Clark, his heirs, executors, administrators, or assigns; or if the said Frederick James Clark, his heirs, executors, or administrators, shall at any time or times hereafter pay to the said Ann Elizabeth Clark the sum of 1500*l.* sterling,—then also, and in any or either of the said cases, the said covenant shall cease and determine: In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written." Averment, that, after the making of the said deed, and before any of the said half-yearly instalments of the said annuity became due or payable under or by virtue of the said deed, the said marriage between the said Ann Elizabeth Clark and the defendant was, by reason of adultery committed by her whilst she was the wife of the defendant, absolutely dissolved according to law, to wit, by a decree final of Her Majesty's Court of Probate, duly pronounced in that behalf, whereof the plaintiff had due notice before the commencement of this suit.

Replication,—that the said supposed adultery in the concluding part of the defendant's plea mentioned, was and is the said adultery in the said deed recited to have been committed with the said J. S., and that the same was committed before the making of the said deed, and not afterwards; and that the said \*marriage was dissolved by reason of the said adultery so recited and committed as afore- [\*887 said, and not otherwise, and not by reason of any adultery committed after the making of the said deed.

The plaintiff also demurred to the plea, the ground of demurrer stated in the margin being, "that the plea does not show the adultery to have been subsequent to the deed, and that the dissolution of the marriage is immaterial."

The defendant demurred to the replication, the ground of demurrer stated in the margin being, "that the fact of the dissolution of the marriage discharged the husband from further obligation under his covenant, whether the act of adultery was antecedent or subsequent to the deed declared on." Joinder.

*Joyce* (with whom was *Lucius Kelly*), for the plaintiff.(a)—The

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the plea does not show the adultery to have been subsequent to the deed, and is therefore bad:

"2. That, if the adultery was subsequent, the dissolution of the marriage is immaterial:

"3. That, on the state of facts as shown in the plea, an absolute and unconditional injunction would not be granted in equity, as the consideration for the deed is at all events partly executed:

"4. That the state of facts disclosed in the plea would not induce the Court of Chancery to control the plaintiff's legal right, as, something having been done by the plaintiff under the deed, the Court could not put the parties in the same relative position as they were in before the deed was executed:

"5. That, the demurrer to the replication admitting that the divorce proceeded on the adultery recited in the deed, the defendant must have been aware when he executed the instrument that a divorce might at any time afterwards have been procured by him, and his liability to his wife's debts determined: therefore, if there was no consideration to support the covenant, it must be taken that the defendant, having full knowledge that he was in a position to obtain his divorce, intended to create a voluntary trust in favour of the wife:

"6. That there is no rule in equity different from that at law, upon the defence raised in the plea:

\*688] validity of a deed of this sort cannot now \*be questioned: *Hunt v. Hunt*, 31 Law J., Chan. 161, 171. In *Evans v. Carrington*, 29 Law J., Chan. 380,(a) after the dissolution of a marriage by the Divorce Court, the husband filed a bill for the purpose of setting aside the marriage settlement, *and also a deed of separation*. It alleged that C., the plaintiff's late wife, had previously to her marriage, unknown to the plaintiff, committed fornication with R.; that the connection was renewed after marriage; that the marriage as well as the settlement was procured by fraud and collusion of C. with R.; and that C. had fraudulently procured the plaintiff to execute the deed of separation for the purpose of more securely carrying on her intercourse with R. Upon demurrer, it was held by Wood, V. C., that the allegation of fraud and collusion, without any more precise statement of facts, was not sufficient to give the Court jurisdiction to set aside the settlement; and also, that, in the absence of any allegation of adultery committed between the date of the marriage and the execution of the deed of

\*689] *\*separation*, there was nothing in the bill on which relief in respect of that deed could be founded. That decision was affirmed by Lord Campbell, C., on appeal,—80 Law J., Chan. 364,—so far as concerned the marriage settlement, but reversed as to the deed of separation. His lordship there says: "The marriage settlement being valid when executed, the wife, according to our law, did not by adultery lose any benefit which it conferred upon her. This has been the clear understanding of all English lawyers; and, if decisions are wanted, I need only refer to *Sidney v. Sidney*, 3 P. Wms. 268, *Blount v. Winter*, 3 P. Wms. 276, n., *Buchanan v. Buchanan*, 1 Ball & B. 203, and *Field v. Serres*, 1 N. R. 121. The simple dissolution of the marriage for adultery makes no difference. Till very recently, this could only be effected by a privilege, —an Act of the legislature, in the form of a divorce bill. Such bills sometimes contained clauses which had full effect, from the omnipotence of Parliament, to vary the provisions of marriage settlements according to what was fit in the circumstances of particular cases. But, in as far as the marriage settlement was not expressly varied by the divorce bill, the marriage settlement stood firm, and might be enforced for the benefit of the divorced wife. Can it be said that there is a difference as to the effect of a dissolution of the marriage, whether this be brought about legislatively, by a privilege, or judicially under a general law? All the arguments for setting aside the marriage settlement after the divorce à vinculo apply with equal force to both modes of dissolution. No new power has been conferred on the Court of equity to interfere with the settlement." The defendant has, at all events, had part of the consideration which the deed contemplated, in the absence of a claim for alimony, and an indemnity against debts

"7. That the indemnity against molestation of the wife, and against application for alimony and for restitution of conjugal rights, is a sufficient consideration to support the covenant:

"8. That the matter set up by the plea merely amounts to a statement that there is a partial failure of consideration:

"9. That a Court of equity will not set aside a contract entered into by parties knowing their rights, though upon the ground of inadequate consideration, or partial failure of consideration; and that here the defendant had full knowledge:

"10. That equity will not set aside a voluntary deed, not obtained by fraud."

(a) See *Evans v. Edmonds*, 13 C. B. 777 (E. C. L. R. vol. 76).

contracted by \*the wife. The adultery recited in the deed is the very adultery upon which the decree was obtained. This [\*690 is, in effect, tantamount to a post-nuptial settlement: *Randle v. Gould*, 8 Ellis & B. 457 (E. C. L. R. vol. 92). In *Baynon v. Batley*, 8 Bingh. 256 (E. C. L. R. vol. 21), 1 M. & Scott 339 (E. C. L. R. vol. 28), it was held that adultery of the wife after separation is no plea to a covenant to pay a trustee a separate maintenance for the wife. A plea to the same effect was disallowed in *Field v. Serres*, 1 N. R. 121. *Jee v. Thurlow*, 2 B. & C. 547 (E. C. L. R. vol. 9), 4 D. & R. 11 (E. C. L. R. vol. 16), by a deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds: it was held that this deed was legal and binding, and that a plea by the husband, that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits charging her with adultery, and that a decree of divorce à mensa et thoro was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity. *Holroyd, J.*, there says: "This is a covenant made to provide for a separation which had been determined upon before the execution of the deed, and is for the payment of an annuity during the wife's life, if the husband should so long live. It is founded upon what the law considers a good consideration; for, there is a covenant by the trustee to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, or thirds." It is clear, therefore, that a divorce can have no operation against the deed. The case of *Fisher v. Fisher*, 31 Law J., Mat. 1, shows \*the limit of the jurisdiction of the Divorce Court to deal with settled property. [KEATING, J.— [\*691 The covenant in question would not prevent the wife from claiming alimony in the Divorce Court.] But she would lose the annuity.

*Macaulay, Q. C.* (with whom was *Raymond*), for the defendant.(a)—*Evans v. Carrington* has no bearing upon this case: and there was no final decision as to the validity of the deed. To say that the covenant in this deed prevents the wife from suing for alimony, is begging the whole question. The trustee engages to indemnify the defendant against a *suil* for alimony, but not against alimony pendente lite. The intention of the deed was, to secure to Ann Elizabeth Clark an annuity of 100*l.* so long as she should remain the wife (or, possibly,

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the plea, being pleaded as an equitable plea, lets in any ground of defence that would have been available in a Court of equity:

"2. That Courts of equity require a valid and continuing consideration to appear, even in the cases of instruments under seal:

"3. That the consideration for the defendant's covenant would in a Court of equity be understood to be founded on the indemnity afforded to the defendant by the covenant for his protection given by the trustee; and that, by the dissolution of the marriage, the trustee's covenant fell to the ground, and with it the covenant of the defendant:

"4. That the annuity mentioned in the deed declared upon was payable only whilst the relation of husband and wife subsisted between the defendant and his late wife; that this is sufficiently shown by the deed; and that the annuity ceased to be payable immediately upon the dissolution of the marriage in the pleadings mentioned."

the widow) of the defendant: and the covenants on the other side are coextensive. The marriage having been dissolved by the decree \*692] of the \*Divorce Court, the *prima facie* liability of the husband to support the wife has ceased, and consequently the whole consideration, the value of the indemnity to him, is gone. [WILLIAMS, J.—Suppose the decree in the Divorce Court had been obtained one day before the expiration of a half-year, would the lady have lost the annuity for the whole of that half-year?] Undoubtedly she would. The whole terms of the deed point to a provision for the support of the wife.

Joyce, in reply.—The covenant is, to pay the annuity during the *natural life* of the wife. If the argument on the other side be tenable, the annuity would cease on the death of the covenantor. Why, then, does he covenant “for himself, his executors and administrators?” It is clear from the whole scope of the deed that the annuity was to be paid during the life of the wife, provided she conducted herself in a chaste and moral manner.

WILLIAMS, J.—I am of opinion that our judgment must be for the plaintiff. The defendant by this deed covenants absolutely that he will pay the annuity to his wife,—of whose adultery he is at the time aware,—during her natural life. It is clear, from the circumstance of his covenanting for himself, his executors and administrators, that he did not contemplate that the annuity should only be commensurate with the period during which she was fulfilling the character of his wife, because it was to continue when she should become his widow, when his obligation to support her as his wife would be at an end. The Divorce Act, 20 & 21 Vict. c. 85, not having then passed, the notion of a dissolution of the marriage must have been altogether out \*693] of the mind of the defendant. The intention was, that the wife should have an annuity of 100*l.* for the term of her life provided she complied with the condition imposed, and led a chaste and moral life. We cannot allow the husband by his own act to absolve himself from his engagement.

WILLES, J.—I am of the same opinion. It does not appear that the wife has misconducted herself since the execution of the deed. We must assume, therefore, that she has complied with all the conditions upon which the annuity was granted to her. It is now sought, by virtue of an Act of Parliament passed five years after the date of the deed, and by the grantor's own act, to which the grantee is not a consenting party, to deprive her of the benefit of the covenant. To hold that the Divorce Act can have the effect contended for by the defendant, would be giving it an *ex post facto* operation of the worst sort.

KEATING, J.—I am entirely of the same opinion. I think it would be extremely unjust if the husband's own act, with no subsequent default on the wife's part, were allowed to defeat the covenant which he has entered into.

Judgment for the plaintiff.

**\*GUNN v. THE LONDON AND LANCASHIRE FIRE INSURANCE COMPANY.** *June 27.* [\*694]

A contract made between the projector and the directors of a joint stock Company provisionally registered, but not in terms made conditional on the completion of the Company, is not binding upon the subsequently completely registered Company, although ratified and confirmed by the deed of settlement.

THIS was an action commenced by plaint in the Lord Mayor's Court, London, and removed by certiorari to this Court.

The declaration stated, that, before the making of the agreement thereafter mentioned, the plaintiff had started the project of forming a certain joint stock Company in England for the purposes within the meaning of an Act of Parliament passed in the eighth year of the reign of Her present Majesty, Queen Victoria, intituled, "An Act for the registration, incorporation, and regulation of joint stock companies" (7 & 8 Vict. c. 110), to be incorporated under the name of "The London and Lancashire Fire Insurance Company;" and the plaintiff had previously registered the said Company pursuant to the said Act, and was the sole registered proprietor thereof, and had incurred various debts, liabilities, and expenses in promoting the said Company: That Francis William Russell, Thomas Dakin, and Joseph Henry Reynell De Castro became and were provisional directors of the said Company; and, in order to further the interests of persons who had applied for and paid deposit-moneys in respect of shares in the said Company, and to enable the said Francis William Russell, Thomas Dakin, and Joseph Henry Reynell De Castro, and their co-directors, to proceed in their endeavours to establish the said Company, the plaintiff had agreed, amongst other things, to relinquish his right as promoter of the said Company: That thereupon articles of agreement were entered into between the plaintiff of the one part and the said Francis William Russell, \*Thomas Dakin, and Joseph Henry Reynell De Castro of the other part, whereby the plaintiff [\*695] agreed (amongst other things) that he would relinquish his right as a promoter of the said Company, and the said Francis William Russell, Thomas Dakin, and Joseph Henry Reynell De Castro agreed, on behalf of the said Company, that, provided the plaintiff performed his part of the said agreement, the said directors should and would, at the expiration of fourteen days after the Company had been completely registered, pay and otherwise carry out whatever might be requisite for the complete performance on their part of one of the two following alternatives, the option of which it was thereby expressly agreed should remain with the said Francis William Russell, Thomas Dakin, and Joseph Henry Reynell De Castro, and their co-directors, that is to say, whether they should appoint the plaintiff to the office of manager of the agency department of the said Company, on certain terms mentioned in the said articles of agreement, or, as to the other alternative, they should pay to the plaintiff the sum of 5000*l.*, one half thereof in cash, and the other half in 1000 shares of the said Company upon which 2*l.* 10*s.* should be considered as paid: Averment, that, afterwards, the said Company was completely registered, and the said articles of agreement were by the deed of settlement of the said Com-

*pany ratified and confirmed, and declared to be valid and binding upon the Company in the same manner as if the same had been entered into, made, or done by the Company, or by the direction or authority of all the shareholders:* Breach, that, although the plaintiff performed his part of the said agreement, and did all things, and all things happened, and all times elapsed, necessary to entitle the plaintiff to the performance by the defendants and the said directors of the said articles of agreement on their part, yet the \*defendants and the said directors \*696] did not, nor did any or either of them, at or before the expiration of fourteen days after the Company had been completely registered, pay or otherwise carry out whatever might be requisite for the complete performance on their part of either of the said alternatives in the said articles of agreement mentioned, but therein made default: Claim, 5000*l*.

Plea,—that the articles of agreement in the declaration mentioned were and are in the words following, that is to say: “Articles of agreement made the 27th of November, 1861, between Alexander Hamilton Gunn, of, &c., of the first part, and Francis William Russell, of, &c., Thomas Dakin, of, &c., and Joseph Henry Reynell De Castro, of, &c., for and on behalf of themselves and the other directors of a certain Company already provisionally registered, and intended to be incorporated under the name of “The London and Lancashire Fire Insurance Company,” of the second part, and which said persons parties hereto of the second part are for brevity hereinafter denominated the said parties of the second part: Whereas the said Alexander Hamilton Gunn, on or about the 12th of October last past, provisionally registered the said Company pursuant to the Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110, and he thereupon became the sole registered promoter thereof; and the said Alexander Hamilton Gunn has incurred various debts and liabilities and expenses in promoting the said Company: And whereas the said parties of the second part and their co-directors have since become, and have been publicly advertised as, directors of the said Company, and as such have, since the 12th of October last, incurred certain liabilities to advertisers, printers, and other persons: And whereas, in order to further the interests of persons who have applied for and paid \*697] \*deposit-moneys in respect of shares in the said Company, to enable the said parties of the second part and their co-directors to proceed in their endeavours to establish the said Company, the said Alexander Hamilton Gunn has agreed to relinquish his right as promoter of the said Company, and all official connection with the said Company, and also to indemnify the said parties of the second part and their co-directors, and each and every of them, not only from and against all liability, loss, costs, charges, and expenses whatsoever, of or in anywise relating to the said Company, and all debts and demands relating thereto incurred by the said Alexander Hamilton Gunn, for which he alone is personally responsible, but also for or in respect of all expenses incurred in advertising the prospectus of the Company and notices closing the list of application for shares, the whole of the printing, stationery, books, salaries, rent, postages, messengers, portage, and provisional registration fees incurred to the date hereof, on the terms hereinafter mentioned: And whereas, in pursuance of

such arrangement, and at the request of the said parties hereto of the second part, the said Alexander Hamilton Gunn hath duly signed the appointment of Mr. F. S. Hull as the solicitor to make returns under the said Act, and the same, and his acceptance thereof, has been duly filed: Now, therefore, for the considerations herein expressed and referred to, the said Alexander Hamilton Gunn doth, and the said parties of the second part do, hereby agree with each other as follows,—1. That the said Alexander Hamilton Gunn shall relinquish his rights as a promoter of the said Company, and shall not have any power, control, or right of interference in the affairs or proceedings of the said Company, and he shall not do any act, matter, or thing in the name or on behalf of the said Company or the directors thereof \*without the previous express authority of the directors for [698 the time being of the said Company for that purpose first had and obtained: 2. That the said Alexander Hamilton Gunn shall, however, upon every reasonable request of the said directors, give all the assistance and services in his power which the said directors for the time being shall or may require of him, in the furtherance of the affairs and objects of the said Company to the time of the complete registration of the Company, and shall not be entitled to any reward or remuneration whatever for such assistance and services, beyond travelling expenses: 3. That, provided the said Alexander Hamilton Gunn shall perform his part of this agreement, the said directors of the said intended Company shall and will, at or before the expiration of fourteen days after the Company has been completely registered, pay and otherwise carry out whatever may be requisite for the complete performance on their part of one of the two following alternatives, the option of which it is hereby expressly agreed shall remain with the said parties hereto of the second part and their co-directors, that is to say, either they shall appoint the said Alexander Hamilton Gunn to the office of manager of the agency department of the said Company for the term of seven years, at a salary of 500*l.* per annum, and a commission of 1*l.* per cent. on all business to be brought during that period by agents appointed on his recommendation (but excluding existing agents of the Queen Assurance Office), and pay to the said Alexander Hamilton Gunn the sum of 1000*l.* in cash, and also the amount of the advertising account incurred by him in reference to the said Company, and all other claims and demands incurred by the said Alexander Hamilton Gunn in reference to the said Company, amounting to the further sum of 2000*l.*, or, as to the other alternative, they shall pay \*to the said Alexander Hamilton Gunn the sum of 5000*l.*, one-half thereof in cash, and the other half in 1000 [699 shares of the said Company upon which 2*l.* 10*s.* per share shall be considered as paid; and, in such last-mentioned case, the said sum of 5000*l.* shall be considered as inclusive of and comprising the fees and charges of Mr. Jenkin Jones in the valuation and other business transacted by him in relation to the contemplated purchase or amalgamation with the fire business of the said Queen Assurance Company, and also all charges for brokerage of whatever description, and all other expenses whatsoever incurred in or about or in reference to the formation and establishment of the Company, and the procuring of subscriptions to the capital thereof, up to and including the 14th of November

now instant, except solicitors' charges, which are to be borne and paid by the Company or the directors thereof: And the said Alexander Hamilton Gunn will accept either of the said two alternatives in full satisfaction and discharge of all claims and demands of the said Alexander Hamilton Gunn in respect of the registration, formation, and promotion of the said Company, and relating thereto, and also in full discharge of all debts, claims, demands, liabilities, and expenses which have been incurred, paid, or laid out by him either on his own behalf or in the names or for the account of the said directors of the said Company, or any of them, in or about the advertising of or otherwise relating to the said Company,—it being, however, distinctly understood and agreed, that the said parties of the second part are to be at liberty, in the first place, to pay and discharge all or any such debts, claims, demands, liabilities, or expenses which they or any or either of them shall or may have incurred or be liable for up to the date hereof, for or in respect of advertising the prospectus, and notices, \*700] \*printing, stationery, books, salaries, rent, and postages as aforesaid, from and out of the said sums payable to the said Alexander Hamilton Gunn, and to pay the balance thereof to the said Alexander Hamilton Gunn, and the sums so paid shall be and operate as a discharge or discharges by the said Alexander Hamilton Gunn to the said parties of the second part, to the extent of the moneys so paid in respect of the said sums payable to him under these presents: 4. That, in consideration of the engagements thereinbefore contained on the part of the said parties of the second part, the said Alexander Hamilton Gunn shall and will hold harmless and indemnify the said parties of the second part, and all other directors of the said intended Company, and each and every of them, from and against all debts, claims, liabilities, and demands whatsoever to all and every persons and person for or on account of the said Company, and the advertising of its prospectus and other papers, and all things relating to the said Company, and all loss, costs, charges, damages, and expenses for or in respect of advertising the prospectus and notices, printing, stationery, books, salaries, rent, postages, messengers, portage, and provisional registration fees as aforesaid, and all other charges, expenses, and liabilities whatsoever to which the said parties hereto of the second part, or any of them, may be or become liable in relation to the said Company, which may have been incurred on or prior to the 14th of November instant, except solicitors' charges, which are to be borne and paid by the said Company or the directors thereof: As witness," &c. Averment, that the said contract in the said articles of agreement mentioned was not made conditional on the completion of the said Company, and to take effect after the certificate of complete registration of the said Company should have been obtained, according to the statute in such case provided.

\*701] \*To this plea the plaintiff demurred,—the ground of demurrer stated in the margin being "that the said contract in the said articles of agreement mentioned, having been ratified and confirmed by the deed of settlement, as alleged in the count, is binding on the defendants, although not made conditional on the completion of the said Company." Joinder.

*Philbrick*, in support of the demurrer.(a)—The contract declared on was clearly one which it was competent to the Company to enter into. The plaintiff was the sole registered proprietor and promoter; and, in \*consideration of his ceding all the rights which the statute [\*702 gives him, the Company agree to pay him a certain sum when they are completely formed. The contract is ratified by their deed, and is made the basis of their legal existence, and to take effect after they are completely formed. It is clearly a contract which they had power, under the 23d section of the 7 & 8 Vict. c. 110, to enter into. That section enacts, "that, on the provisional registration of any Company being certified by the registrar of joint stock Companies, it shall be lawful for the promoters of any Company so registered to act provisionally, &c.; and it shall be lawful for the promoters of such Company to assume the name of the intended Company, but coupled with the words 'registered provisionally,' and also to open lists, and also to allot shares and receive deposits thereon, &c., and also to perform such other acts only as are necessary for constituting the Company, or for obtaining letters patent, or a charter, or an Act of Parliament; but not to make calls, nor to purchase, contract for, or hold lands, nor to enter into any contracts for any services, or for the execution of any works, or for the supply of any stores, except such services and stores or other things as are necessarily required for the establishing of the Company, and except any purchase or other contract to be made conditional on the completion of the Company, and to take effect after the certificate of complete registration, Act of Parliament, or charter, or letters patent shall have been obtained," &c. [WILLES, J., referred to *Hutchinson v. The Surrey Consumers Gas Company*, 11 C. B. 689 (E. C. L. R. vol. 73), where it was held that a joint stock Company completely registered under the 7 & 8 Vict. c. 110, is not liable upon contracts entered into by the promoters before provisional registration.] They may do such acts as are necessary for the formation or establishing of the \*Company. [\*703 This was a contract which they were competent to enter into, and was for their benefit. Taking the 23d section with the 25th,—which provides, that, upon complete registration, "any covenants or engagements entered into by any of the shareholders or other persons

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the defendants were bound by the articles of agreement, as they were ratified by the deed of settlement of the Company:

"2. That the defendants were liable on the contract with the plaintiff, as such contract was executed, and was for their benefit, after the complete registration of the Company, although not in terms made conditional on such complete registration:

"3. That the contract set out in the declaration was not one that required to be expressly made conditional on the completion and complete registration of the Company, as it was a contract for the relinquishment by the plaintiff of his right to complete registration, and could only take effect by such registration:

"4. That, even assuming the contract was one that required to be made conditional on the complete registration of the Company, it sufficiently appears by the declaration to have been made so conditional, inasmuch as no part of the said contract was to be performed by the defendants till after the complete registration:

"5. That there is nothing on the face of the plea to show that it was necessary that the contract set out should be made conditional on the completion of the said company, and to take effect after the complete registration, and the plea is therefore bad:

"6. That the said contract was not one required by the statute to be made conditional on the complete registration of the Company."

with any trustee on the behalf of the Company, at any time before the complete registration thereof, may be proceeded on by the said Company and enforced in all respects as if they had been made or entered into with the said Company after the incorporation thereof,"—it is clear that certain contracts made before are binding on the Company after complete registration. [WILLES, J.—The 28d section is to be read as part of the general scheme of registration, and as absolving the directors from penalties for doing certain acts before the complete registration of the Company. WILLIAMS, J.—To make a contract valid, there must be parties existing at the time who are capable of contracting. The Company did not exist at the time this agreement was made. I feel great difficulty in saying that the 23d section intended to give them that sort of pre-existent capability of contracting.] The contract is impliedly conditional on the complete registration of the Company.

\*704] *J. Brown*, contra. (a)—In *Payne v. The New South \*Wales Coal and International Steam Navigation Company*, 10 Exch. 283,† the first count of the declaration stated, that the plaintiffs had projected a joint stock Company within the meaning of the 7 & 8 Vict. c. 110, which Company was afterwards provisionally registered; that, within twelve months after its provisional registration, articles of agreement were entered into between the plaintiff of the one part, and P. and L. of the other part, whereby the plaintiffs agreed to transfer to P. and L., on behalf of the Company, all the interest of the plaintiffs therein: and P. and L. on behalf of the Company agreed, that, in case the plaintiffs should, within six calendar months after the arrival of the first of the steam-vessels to be despatched by the Company in the colony of Australia, commence the business of ship-brokers at Sydney, the plaintiffs should be the ship-brokers of the Company for the port of Sydney; and further that the Company should provide the plaintiffs with a free passage to the said colony by the first of the Company's steam-vessels so to be despatched. The count then averred, that, afterwards the Company was completely registered, that, after the provisional registration of the Company, the first steam-vessel was despatched by the Company to Australia, and that the plaintiffs were willing to have gone by it, and did all things necessary to entitle them to the agreed passage; and alleged for breach that the Company refused to permit the plaintiffs to go by \*705] that vessel. It was held, on demurrer, that the count was bad, \*since the completely registered Company was not liable on the contract made by the provisionally registered Company. *Martin, B.*, there says: "This was a contract by the promoters of the Com-

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the defendants, being a corporation under the 7 & 8 Vict. c. 110, were no parties to, and were not liable to be sued on, the contract declared on, which was made before the corporation existed:

"2. That the contract declared on was made by the individual directors of the Company provisionally registered, and not by the Company, as such:

"3. That, if the contract was made by the provisionally registered Company, it is not binding on the completely registered Company, who are defendants in this action:

"4. That the contract was not one which the provisional directors had power to make under the 7 & 8 Vict. c. 110, s. 23, and was not made conditional on the completion of the Company, and to take effect after the certificate of complete registration should be obtained, as required by the statute:

"5. That the only parties liable on the contract, are, the directors who made it."

pany after provisional and before complete registration; and it is clearly not a contract which the completely registered Company is bound to perform. The 23d section of the Act authorizes the promoters of a Company to obtain a certificate of provisional registration, and, upon that being done, it becomes lawful for them to do certain things which are specified. But, so far from being enabled to bind the completely registered Company by this contract, they can make very few contracts to bind themselves."

Per CURIAM.—If the plaintiff wishes to raise this point, he must do so in the Court of error. Judgment for the defendants.

In the Matter of JOSEPH JOHN WRIGHT, an Attorney,—Ex parte  
MARY ANN THOMAS. *May 27.*

Practice on a rule calling upon an attorney to answer the matters.

It is no answer to such an application, that the applicant has already filed a bill in equity against the attorney for an account in reference to the transactions complained of,—even though the proceedings in equity have resulted in a decree against the attorney.

Where it has been referred to the master to examine into the charges and to report to the Court, it is not competent to the counsel for the accused to go into the evidence given before the master: the Court will only look to his report.

UDALL, in Michaelmas Term last, moved for a rule calling upon Joseph John Wright, an attorney of this Court, to show cause why he should not answer the matters contained in certain affidavits which charged him with having fraudulently appropriated to his own \*use moneys to the amount of 2252*l.* which had been intrusted [\*706 to him by the applicant for investment, and with a series of misrepresentations as to the manner in which he had disposed of them. It also appeared from the affidavits that the applicant had filed a bill in Chancery against Mr. Wright and had obtained a decree, but that she had been prevented from obtaining any fruits from it in consequence of Mr. Wright having gone to Scotland and there availed himself of the Scotch law of bankruptcy. [ERLE, C. J.—Has not the applicant precluded herself from taking this course by her election to proceed by bill in equity for an account?] It has been decided that filing a bill in equity against an attorney is no answer to an application against him to the summary jurisdiction of the Court for misconduct. Chitty's Archbold, 11th edit. 147, citing Anonymous, 4 Jurist 630. [ERLE, C. J.—That was a mere application to Chancery. Here, it is rem judicatam. I am unwilling to grant a rule which may be discharged. But possibly a rule might be sustained if anything like misconduct in the attorney could be shown in his going colourably to Scotland to defeat a just claim.]

Udall renewed his motion on a subsequent day, with further affidavits, and the rule was granted.

Bovill, Q. C., and T. J. Clark, in Hilary Term last, appeared to show cause against the rule, strongly urging the staleness of the transactions (they having arisen nearly eleven years ago), and that the present motion was only resorted to for the purpose of extorting money from the attorney in satisfaction of a debt from which he had been discharged by means of the Scotch sequestration.

\*707] After hearing *Mellish*, Q. C., and *Udall* in support of the rule, the Court pronounced a rule referring it to one of the Masters "to ascertain, in such manner as he should think fit, whether or not the said Joseph John Wright, in his capacity of attorney or solicitor for the said Mary Ann Thomas, was guilty of any fraud or misconduct in respect of the sum of 2252*l.* referred to in the affidavit of the said Mary Ann Thomas in the rule mentioned, or of any part of the said sum, or in respect of any interest or other moneys arising therefrom or from the estate alleged by the affidavit of Mr. Wright to have been sold to Mr. G. Stuart; and that the Master report thereon to the Court,"—the rule being in the mean time enlarged.

The Master (Mr. *Benett*), after a long and careful investigation, and examination of Mr. Wright, on the 7th of May last made his report, in which he found that the charges made against that gentleman were entirely substantiated.

*Bovill*, Q. C., and *Clark*, on behalf of Mr. Wright, sought to refer to the evidence which was given before the Master, in order to show that that learned gentleman had taken a view against the accused stronger than was fairly and reasonably warranted by the circumstances. [ERLE, C. J.—Where a matter is referred to the Master, his report is the only thing which is properly before the Court. I must protest against the evidence given before him being gone into. You may make your statement; and, if we see fit, we will refer to our \*708] officer.(a)] The learned counsel then proceeded \*at great length and with much earnestness to endeavour to explain away the more grievous parts of the charges.

*Mellish*, Q. C., and *Udall* were heard in support of the Master's report. *Cur. adv. vult.*

ERLE, C. J.—By the practice two courses are open,—first, to issue an attachment, to be followed by interrogatories. This we think an unnecessary delay and expense after the clear and complete examination of the case by the Master. The other is, to order that the attorney be struck off the roll, as was done in the case against Mr. Sills.

We think the latter course the proper one under the circumstances of this case. But, as the attention of the attorney was not pointed directly to that result by the rule calling on him to answer the matters of the affidavit, we decide to enlarge this rule peremptorily to the sitting of the Court on the first day of next term, when, after hearing Mr. Wright again, if he should require it, the Court will give its final decision.

On the first day of this term, *Clark* and *Garth* urged all that could be said in favour of Mr. Wright: but his efforts were unavailing, and the Court ordered, "that the name of the said Joseph John Wright be struck off the roll of this Court, and that the said Joseph John Wright do pay to the said Mary Ann Thomas, or to her attorney, her costs of and occasioned by the said rules respectively, and of the reference directed by the rule of Hilary Term last; and that, in default of such

(a) This is the course usually adopted in the case of applications under the Railway and Canal Traffic Act, 1852 (17 & 18 Vict. c. 31).—In *re Oxlade and The North Eastern Railway Company*, 1 C. B. N. S. 454, 477, 489 (E. C. L. R. vol. 87). It was departed from in a subsequent case,—In *re Nicholson and The Great Western Railway Company*, 5 C. B. N. S. 366 (E. C. L. R. vol. 94),—but the departure was found to be extremely inconvenient.

payment, an attachment do issue against the said Joseph John Wright for non-payment of the same, but that such writ do lie in the office for one calendar month after issuing the same."

\*THE LONDON AND PROVINCIAL PROVIDENT SOCIETY *v.* ASHTON. June 2. [\*709]

Held,—upon the authority of The London Monetary Advance and Life Assurance Company *v.* Smith, 3 Hurlst. & N. 543,†—that an insurance Company (registered under the 7 & 8 Vict. c. 110), which professed to be established for the following purposes,—“1. The granting of policies of insurance upon lives or survivorships,—2. The granting of endowments to children and adults,—3. The granting of annuities, to commence either immediately or prospectively, and to continue either for a definite time or until death,—4. The assurance to persons of both sexes a weekly sum or payment during sickness, and to married women a certain weekly sum during the period of accouchement, either with or without medical attendance and medicine,—5. The granting loans and making advances upon personal or other security, so as the interest made payable upon any such loan or advance shall not exceed 7½ per cent.; and the doing of all acts incident thereto,”—was disqualified, by reason of the enactments contained in the 27th and 28th sections of the 20 & 21 Vict. c. 14, from suing either at law or in equity, unless registered under the Joint Stock Companies Acts, 1856, 1857. [Sed vide post, p. 100.]

THIS was an action for money payable by the defendant to the plaintiffs for money received by the defendant for the use of the plaintiffs, and for money paid by the plaintiffs for the defendant at his request, and for money found to be due from the defendant to the plaintiffs on accounts stated between them.

The defendant pleaded, *inter alia*, that this action was commenced long after the 2d of November, 1857, and not before, and that the said alleged society was and is a Company formed, constituted, and completely registered under the 7 & 8 Vict. c. 110, for the registration, incorporation, and regulation of joint stock companies; that the said society did not on or before the 2d of November, 1857, nor at any time before the commencement of this action, nor at any time since, register, nor become, nor is it registered under the Joint Stock Companies Acts, 1856, 1857, or either of them, pursuant to the last-mentioned Acts or either of them, but has always made default in so doing; that the said society was not nor is a company *formed for the purpose of insurance* within the meaning of the Joint Stock Companies Act, 1857, that is to say, *solely for that purpose*, and always was and is a \*Company formed in part for the purpose of insurance, and also [\*710] for purposes other than the purpose of insurance, and other than for the purpose of banking, that is to say, amongst other purposes, for the purpose of granting annuities and lending money.

Second replication to the first plea,—that the said society was and is a joint stock Company completely registered as in the first plea mentioned; that the said Company was and is formed and constituted under and by virtue of two deeds of settlement under the hands and seals of certain then shareholders in the said Company and of certain trustees, and not otherwise, and which said deeds of settlement were respectively made, executed, and witnessed as by law in that behalf required,—the first of which said deeds was and is a deed bearing date the 23d of July, 1855, between the several persons whose names were or should be mentioned in the schedule of signatures thereto, and

who had sealed and delivered, or from time to time should seal and deliver the same, or a duplicate thereof, of the one part, and Stephen Pott and Edmund Carey Hobson, trustees for the purposes of the said deed, of the other part, by which,—after reciting, amongst other things (being the only recitals material to the said first plea and this replication), that the several persons parties thereto of the first part had agreed to form a joint stock Company within the meaning of the 7 & 8 Vict. c. 110, for the purposes of granting life assurances, for payments during sickness, annuities, endowments, and other assurances dependent upon contingencies, as thereafter defined,—it was witnessed (so far as is material to the said first plea and this replication respectively) in the words, letters, and figures following, that is to say, that each of the said several persons parties hereto of the first

\*711] part, so far as relates to the acts and defaults of himself, his executors and administrators, and not otherwise, does hereby, for himself, his heirs, executors, and administrators, covenant with the said Stephen Pott and Edmund Carey Hobson, as trustees on behalf of the said Company, as follows:—

“1. That the several persons now being or hereafter becoming parties hereto (and who are designated as ‘shareholders’), and all persons who shall hereafter become shareholders, shall, while holding shares in the capital stock hereinafter mentioned, be and constitute a joint stock Company within the meaning of the said Act, under the name of ‘The London and Provincial Provident Society,’ and that such Company shall be formed from the day of the date of these presents, and continue till dissolved under the provisions in that behalf hereinafter contained:

“2. That the object and business of the Company shall be,—

1. The granting of policies of insurance upon lives or survivorships,—
2. The granting of endowments to children and adults,—
3. The granting of annuities, to commence either immediately or prospectively, and to continue either for a definite time or until death,—
4. The assurance to persons of both sexes a weekly sum or payment during sickness, and to married women a certain weekly sum during the period of accouchement, either with or without medical attendance and medicine,—
5. The granting loans and making advances upon personal or other security, so as the interest made payable upon any such loan or advance shall not exceed  $7\frac{1}{2}$  per cent.; and the doing of all acts incident thereto:

“4. That the capital stock of the Company shall consist of 10,000*l.* divided into 5000 shares of 2*l.* each, and of such further sum not exceeding 40,000*l.* in addition as may be determined by the shareholders, as hereinafter mentioned:

\*712] “5. That, until such time as the capital shall have been increased under the last preceding article to 50,000*l.* and the whole of such 50,000*l.* shall have been subscribed for, and at least 5*s.* shall have been paid or be payable upon every share in the capital, it shall not be competent to the Company to grant any assurance, endowment, or otherwise to make any sum payable on any contingency, where the principal money payable by them on the happening of such contingency would exceed 500*l.*, or to grant any annuity of more than 50*l.* per annum:

“ Direction and management of the affairs of the Company, and election and appointment of directors and other officers :

“ 39. That the number of directors of the Company shall not be more than fifteen nor less than five :

“ 56. That the directors shall have full power to carry on, on behalf of the Company, the business of the Company as hereinbefore defined, and to grant all insurances, endowments, and annuities on behalf of the Company, and which are within the scope of their business, and to accept the surrender of any policy or annuity, on such terms as they may think fit, and to effect counter-insurances in any other insurance office against any risk granted by the Company, or any part thereof, and to grant such loans or advances as are within the scope of the Company's business, and to make and execute all deeds and instruments to which it may be necessary to affix the common seal, and to enter into all contracts on their behalf, and to make all proper purchases and assurances, and generally to do all acts which they shall consider necessary or proper for the well ordering of the affairs of the Company, and to execute all powers in relation thereto which are within the scope of the Company's business, subject, \*nevertheless, to the control of general meetings of the Com- [\*713 pany and to these presents : Provided always that every policy, whether upon life, for endowment, or for a fund in sickness, and every grant of an annuity made or granted by the Company, shall be given under the hands of three directors of the Company, and be countersigned by the secretary of the Company, and be sealed with the seal of the Company, and that there be contained therein, and in every other contract of assurance, endowment, annuity, or other provision to be made by the Company, or entered into on their behalf, a proviso limiting the contract thereby created and the liability thereunder, so that the same shall take effect and be satisfied only out of such funds and property of the Company (including unpaid instalments upon shares) as under the provisions herein contained shall at the time when such liability shall accrue be at the disposal of the directors, and negating an unconditional liability : Provided always that nothing herein contained shall limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any such shareholder under or by virtue of the aforesaid statute : Provided also, that, whenever any alteration shall be made in the terms of any policy, grant of annuity, or other instrument under the seal of the Company, containing the terms of any contract within the scope of the Company's business, the directors shall cause a memorandum of such alteration to be endorsed on the policy, grant, or other instrument, and to be signed by the secretary, and sealed with the common seal ; and every such alteration so signed and sealed shall be binding on all parties : Provided also, that no loan or advance shall be made upon personal security, unless, in addition to the person to whom such loan or advance shall be made, at least two \*sufficient sureties, to be approved by the directors, shall also become bound for the repayment of the money lent or advanced, [\*714 and for the repayment of all interest thereon :

“ 93. That there shall be created by the directors in the manner hereinafter mentioned, out of the moneys and property of the Com-

pany, four separate funds, to be denominated 'The Proprietors' Fund,' 'The Assurance Fund,' 'The Sickness Fund,' and 'The Endowment Fund,' and that separate and distinct accounts of such respective funds shall be kept in the Company's books:

"94. That all moneys arising from payments made upon the shares in the capital of the Company subscribed for, and all interest paid upon calls in arrear, and all moneys arising to the Company upon the sale of shares which shall have been forfeited to and sold by the Company, and all moneys arising to the Company from interest or discounts, or other profits arising to the Company upon loans or advances as hereinafter mentioned, and all such further sums as by these presents or by any by-laws of the Company, or any resolution of a general meeting or order of a board of directors may be directed to be consolidated with the Proprietors' Fund, and also all moneys arising from the improvement and accumulation of the said fund, shall form 'The Proprietors' Fund:'

"95. That the produce of premiums and profits arising from and to be received in respect of policies of assurance on lives or survivorships, and all the accumulations and improvements of such fund, shall form a second separate and distinct fund, to be called 'The Assurance Fund:'

"96. That the produce of premiums and profits arising from and to be received in respect of policies of assurance for payment during sickness and \*accouchement, and all accumulations and improvements of such funds, shall form and constitute a third separate and distinct fund, to be called 'The Sickness Fund:'

"97. That the produce of premiums and profits arising from and to be received in respect of the granting of endowments and annuities, and all the accumulations and improvements of such fund, shall form and constitute a fourth separate and distinct fund, to be called 'The Endowment Fund:'

"98. That each of the three last-mentioned funds shall be primarily liable to bear and pay all losses and claims of and against the Company upon and in respect of the particular business of the Company, from the profits or premiums upon which such fund is constituted:

"99. That the costs and expenses of the outfit, establishment, management, and generally of the carrying on the business of the Company, shall be borne and paid by and out of the 'Assurance Fund,' 'The Sickness Fund,' and 'The Endowment Fund:' and such costs and expenses shall from time to time as and when they are paid, be divided among and borne by the said three funds in shares as nearly as may be proportionate to their respective amounts for the time being:

"100. That, in case any one of the said funds cannot be made available in time, or it shall be insufficient to pay and satisfy any such loss or claim to be borne or paid by or out of it as above mentioned, or the share to be borne by it of such costs and expenses, then so much as may be required for the purpose of making up the amount of such share shall be borrowed from 'The Proprietors' Fund,' and be applied to meet such exigency or deficiency; or, if that shall be insufficient, then either or both of the other funds, \*as the directors shall  
\*716] think fit, and, if both, in such proportions as they shall think

fit; but, whenever 'The Proprietors' Fund' or any of the other funds shall be resorted to in aid of or for any of the other funds above mentioned, the sum so borrowed from 'The Proprietors' Fund,' shall be in the nature of a debt owing to 'The Proprietors' Fund,' or to such other fund, from the fund in aid of or for which it shall have been borrowed, and shall as soon as practicable be replaced thereout, with interest at the rate of 5l. per centum per annum:

"101. That, on the 1st day of July, 1860, and on the same day in the year 1865, and so on from five years to five years, or so soon as conveniently may be after those days respectively, the directors shall cause accounts to be taken of the clear profits which (after deducting such expenses and charges as aforesaid) have theretofore, and (as respects the second and every subsequent account) since the last preceding account, have accrued upon and in respect of 'The Assurance Fund,' 'The Sickness Fund,' and 'The Endowment Fund,' respectively, and which may in the judgment of the actuary and the directors be safely set apart out of such funds respectively; and such accounts shall be submitted to the ensuing ordinary general meeting for confirmation; and, if such accounts or any of them shall not be confirmed at such general meeting, the said accounts, or such of them as shall not have been confirmed, shall be referred back to the directors to revise the same; and the same, when revised by the directors, shall be submitted to an extraordinary general meeting to be summoned for the purpose of examining them; and so toties quoties until the same shall have been confirmed by some general meeting:

"102. That, when such report and accounts shall \*have been confirmed as aforesaid, the directors shall appropriate to and [\*717 consolidate with 'The Proprietors' Fund' the amount so set apart:

"113. That, as to such of the funds of the Company as shall not be required to satisfy and provide for the immediate claims upon the Company, and the expenses thereof, the directors shall from time to time, so far as conveniently may be, lay out and invest the same, in the names of the trustees of the Company, in the parliamentary stocks or funds of Great Britain and Ireland, or in Bank or East India Stock, or in Navy or Exchequer Bills or Bonds, or in or upon the security of the bonds, mortgages, or debentures of any railway or other Company in Great Britain, or (with the necessary license) any real securities in Great Britain or Ireland, or *loans or advances upon securities within the scope of the Company's business as defined in Article 2*, or on such other securities as the directors shall from time to time think proper; subject, nevertheless, to such restrictions as may from time to time be imposed by any general meeting.

"Interpretation.

"164. That, in the interpretation of these presents, the following words and expressions shall be considered to have or include the meanings hereby assigned to them respectively, so far as such meanings are not inconsistent with the context, or excluded by the nature of the subject-matter, that is to say, the expression 'the Company' shall mean the Company; the expression 'these presents' shall also include any and every supplementary deed of settlement, any by-laws and regulations for the time being binding upon the Company; and all words and expressions which are by the Act 7 & 8 Vict. c. 110

declared to have or include or be applicable to any particular meanings \*respectively in that Act, shall have and include the same respective meanings in these presents."

And the said deed contains a schedule, as follows:—

'Part 1. *The name, business, and places of business of the Company.*

General heads.	Particulars.	Class of deed.
Name of the Company .	The London and Provincial Provident Society . .	1
Business or purpose . .	The granting of,—1. Life assurances,—2. Endowments,—3. Annuities,—4. Assurances for payments during sickness,—5. Loans, and the doing of all acts incident thereto . . . . .	2
Principal or only place of business, and branch offices (if any) . . . }	No. 19, Moorgate Street, in the city of London . .	3

That the second of the said deeds was and is a certain new and supplementary deed of settlement, bearing date the 10th day of March, 1859, and made between the several persons whose names were or should be mentioned in the schedule of signatures thereto, and who had sealed and delivered, or from time to time should seal and deliver the same, of the one part, and the said Stephen Pott and Edmund Carey Hobson, trustees for the purposes of the said deed, of the other part; whereby, after reciting (being the only recitals material to the said first plea and this replication, amongst other things) the first-mentioned deed of settlement, and that the same was duly registered in pursuance of the Act 7 & 8 Vict. c. 110, and that the said society was formed for the purposes mentioned in the said first-mentioned deed, and which were repeated in the said recital to the said last-mentioned deed; and further reciting that the said Company had since its formation carried on its business in conformity \*with the terms

\*719] and conditions of the said first-mentioned deed,—the several clauses of the said deed of settlement were (so far as is material to the said first plea and this replication) amended, altered, or repealed in the words, letters, and figures following, that is to say,—That clause 5 shall be altered, to give the Company power with its present shares, capital, and funds, to grant any assurance, endowment, or otherwise, or to make any sum of money payable on any contingency, where the principal money payable by them on the happening of such contingency shall not exceed the sum of 5000*l.*, and also to grant any annuity not exceeding 500*l.* per annum,—That clause 56 shall be altered, by adding thereto, after the words 'endowments and annuities,' the following words, 'and also the purchase and sale of reversionary interests,'—That clause 93 shall be expunged,(a)—That clause 94 to 102, both inclusive, shall be expunged, and in lieu thereof it shall be provided that all the said funds therein mentioned shall be brought into and form one common fund:—"

Averment, that all things were duly done and happened necessary to the validity of the said respective deeds, and that all things were

(a) Creating the four several funds.

done and happened necessary to entitle the said Company to have, and the said Company duly obtained, a certificate of complete registration, and the said deeds respectively were duly registered under the said statute 7 & 8 Vict. c. 110; and that the plaintiffs had always carried on business under and in accordance with the said first-mentioned or original deed of settlement, and not otherwise, until the execution of the said new and supplementary deed of settlement, and afterwards under and by virtue of the said first deed of settlement as modified and altered by the said new and \*supplementary deed of settlement, and not otherwise; and that the said Company was not [\*720 nor is formed for the purpose of granting annuities or lending money, or for any other than the purpose of insurance, further or otherwise than in this replication appears.

Third replication to the first plea,—That the said society was and is a Company constituted and registered as in the second replication to the first plea mentioned, and not otherwise; that they the plaintiffs have always carried on the business of insurance as the main and principal purpose and object of their said society, and that, as part and parcel of the said business of insurance, and subsidiary thereto, the said society have also carried on their business by granting annuities and lending money; that they have never carried on any business other than that of insurance as the principal or main object or purpose of the said society; and that the causes of action in the declaration mentioned arose wholly out of their said business of insurance, and not otherwise, and had no reference to or connection to or with any other business whatever.

To these replications the defendant demurred, the only grounds of demurrer stated in the margin being “That the case is governed by *The London Monetary Advance and Life Assurance Company v. Smith*, 3 Hurlst. & N. 543,† and that the Court of Common Pleas is bound by the decision of the Exchequer, and should not reopen the question, and that the decision is right.” Joinder.

*Wordsworth*, Q. C., in support of the demurrer.(a)—\*The [\*721 question in this case turns upon the construction to be put upon the 27th and 28th sections of the Joint Stock Companies Act, 1857, 20 & 21 Vict. c. 14. The 27th section enacts that “every Company completely registered under the 7 & 8 Vict. c. 110, including any Company that has obtained a certificate of complete registration under *The Limited Liability Act*, 1855 (18 & 19 Vict. c. 133), but excluding any Company *formed for the purpose of insurance*, shall, if it has not already registered under the principal Act (*The Joint Stock Companies Act*, 1856, 19 & 20 Vict. c. 47), register under the Joint Stock Companies Acts, 1856, 1857, on or before the 2d day of November, 1857, or incur such penalty as is hereinafter mentioned. And the 28th

(a) The points marked for argument on the part of the defendant were as follows:—

“That the court is bound by the judgment of the Court of Exchequer in *The London Monetary Advance and Life Assurance Company v. Smith*, 3 Hurlst. & N. 543†:

“That the words of s. 27 of the 20 & 21 Vict. c. 14, fully bear out that judgment:

“That the legislature should amend the Act, if that judgment leads to what was not intended:

“That several sessions have passed since that judgment was given, and that, as so many persons are interested in having the law set right if it has been wrongly interpreted, it must now be considered that the judgment is in accordance with what the legislature intended.”

section enacts, that, "if any Company hereby required to register under the Joint Stock Companies Acts makes default in registering on or before the said 2d day of November, 1857, then, from and after such day, until the day on which such Company is registered under the Joint Stock Companies Acts, 1856, 1857, the following consequences shall ensue, that is to say, (amongst others), the Company shall be incapable of suing either at common law or in equity, but shall not be incapable of being made a defendant to a suit either at law or in equity." The Court of Exchequer, in *The London Monetary Advance and Life Assurance Company v. Smith*, 3 Hurlst. & N. 543,† has put a construction upon the statute which must govern this Court: \*722] holding that the 27th section \*only exempts from such registration Companies formed solely for the purpose of carrying on the business of insurance; and therefore, that, where a Company completely registered under the 7 & 8 Vict. c. 110, formed for the purpose and carrying on the business of insurance *and also the lending of money*, made default in registering under the Acts of 1856 and 1857, the 28th section rendered it incapable of suing either at law or in equity.

*Mellish*, Q. C. (with whom was *Hannen*), *contra*.(a)—In the case referred to, it was admitted on the record that the Company was formed for a purpose beside the business of insurance: here the deed is set out, leaving it to the Court to judge whether the Company is not substantially formed for the purpose of carrying on the business of insurance,—the other being something merely accessory to the main business. No doubt, the plaintiffs propose to lend money and make certain investments: but all that is a mere mode of making profitable use of the funds derived from granting policies. [WILLIAMS, J.—The Company might drive a thriving trade and yet never grant a single policy.] That could hardly be, consistently with the terms of \*723] the deed. The legislature evidently considered the \*7 & 8 Vict. c. 110 to be more appropriate to insurance and banking Companies than the Joint Stock Companies Acts, 1856, 1857. The third replication, which alleges "that the plaintiffs have never carried on any business other than that of insurance as the principal or main object or purpose of the said society," at all events affords a good answer to the action. It is penalty enough to say that the Company shall not maintain an action in respect of anything done by them dehors the business of insurance.

*Wordsworth*, in reply, was stopped by the Court.

Per CURIAM.—We feel bound by the decision of the Court of Exchequer in *The London Monetary Advance and Life Assurance Company v. Smith*, 3 Hurlst. & N. 543,† and are unable to distinguish it from the present case on the ground urged by Mr. *Mellish*.

Judgment for the plaintiffs.

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the plaintiffs' Company is not such a Company as required to be registered under the Joint Stock Companies Acts, 1856, 1857, or either of them:

"2. That the case of *The London Monetary Advance and Life Assurance Company v. Smith*, 3 Hurlst. & N. 543,† is not applicable to the present case,—the primary object of the plaintiffs' company being for the business of insurance, and the causes of action arising solely out of such business:

"3. That the case of *The London Monetary Advance and Life Assurance Company v. Smith* is not right."

The defendant brought a writ of error, which came on for argument in the Exchequer Chamber, at the sitting after Michaelmas Term, 1862, before Pollock, C. B., Wightman, J., Bramwell, B., Channell, B., and Blackburn, J.

*Mellish*, Q. C. (with whom was *Hannen*), for the plaintiffs.—This is in effect an appeal against the decision of the Court of Exchequer in *The London Monetary Advance and Life Assurance Company v. Smith*, 3 Hurlst. & N. 543.† The decision of the Court of Exchequer amounts to this, that, although insurance Companies were not compellable to register under the \*Joint Stock Companies Act, [724 1857, yet, if it carries on any other business besides insurance business, it must be registered. The attention of the Court was not called to the previous statutes, which show that it was illegal for an insurance Company to register. By the 7 & 8 Vict. c. 110, s. 2, it was enacted that that Act should apply to every joint stock Company, as thereafter defined, established “for any commercial purpose, or for any purpose of profit, or for the purpose of insurance:” and it was declared that the term “joint stock Company” should comprehend “every assurance Company or association for the purpose of assurance on lives, or against any contingency involving the duration of human life, or against the risk of loss or damage by fire, or by storm or other casualty, or against the risk of loss or damage to ships at sea or on voyage, or to their cargoes, or for granting or purchasing annuities on lives, and also every institution enrolled under any of the Acts of Parliament relating to friendly societies, which institutions shall make assurances on lives, or against any contingency involving the duration of human life to an extent upon one life or for any one person to an amount exceeding 200*l.*, whether such Companies, societies, or institutions shall be joint stock Companies or mutual assurance societies, or both.” This is no doubt an insurance Company; and it is registered under that statute. The 66th section gives an execution by sci. fa. against the individual shareholders in default of satisfaction being obtained against the property of the Company. The intention of the legislature was that insurance Companies should not be relieved from that liability. Then came the Joint-Stock Companies Act, 1856, 19 & 20 Vict. c. 47, which begins with a recital that “it is expedient that the law relating to the incorporation and regulation of joint stock Companies \*and other associations, should be consolidated and amended.” [\*725 And the 2d section, which does not appear to have been noticed in the case in the Exchequer, expressly enacts that “this Act shall not apply to persons associated together for the purpose of banking and insurance.” That clearly embraces this Company, which is formed for the purpose of insurance, though an incidental part of its business consists of lending money and granting annuities. Could this Company register under that Act? [WIGHTMAN, J.—If the registration took place, it would be simply void, and could do no harm.] It would be the duty of the registrar to refuse to register it. [WIGHTMAN, J.—According to your argument, a Company really intended for other purposes, may avoid registration by putting in insurance. BLACKBURN, J.—The third replication, whether good or bad, was framed to meet that.] The policy of the Acts was, not to bring banking and insurance companies within the limited liability

principle. Then came the Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 14), which by s. 2, is to be construed with the Act of the previous session as one Act. The 3d section repeals the 4th section of the Act of 1856,<sup>(a)</sup> and substitutes for it the following \*enactment,—“If after the passing of this Act more than twenty persons carry on, in partnership, any trade or business having for its object the procurement of gain to the partnership, then, unless such persons are included within one of the classes following, that is to say,—1. Are registered as a Company under the principal Act (1856),—2. Are a Company incorporated or otherwise legally constituted by or in pursuance of some Act of Parliament, Royal charter, or letters patent, or,—3. Are engaged in working mines within and subject to the jurisdiction of the stannaries,—each of the persons so carrying on business in partnership together contrary to this provision shall be severally liable for the payment of the whole debts of the partnership, and may be sued for the same without the joinder in the action or suit of any other member of the partnership.” This was not intended to apply to banking and insurance companies. That is made quite clear by an Act of the same session, c. 80, which enacted that “the Joint Stock Companies Acts, 1856, 1857, should not, nor should either of them, be deemed to have repealed, as respects Companies already formed for the purpose of carrying on the business of insurance under the 7 & 8 Vict. c. 110, or as respects Companies thereafter to be formed for the said purpose, the said Act 7 & 8 Vict. c. 110, or any other Act amending the same, or relating to such Companies.” [BLACKBURN, J. —You say that this Company was registered as far as it was necessary or lawful for them to be registered?] Precisely so. The words of the 27th section of the 20 & 21 Vict. c. 14, “any Company formed for the purpose of insurance,” must mean the same as the words “persons associated together for the purpose of insurance,” in the 2d section of the 19 & 20 Vict. c. 47. What was the object of the insertion of those \*727] words in the Act of 1856? Was it to save \*them from disabilities? Or, was it not rather to put them under a disability? If the object or one of the objects of the exclusion of banking and insurance Companies from the Act of 1856 was to prevent them from being formed with limited liability, the exclusion must equally apply to Companies formed partly for banking or insurance and partly for some other purpose; otherwise, by adding brewing or brick-making or any other trade, a Company really established for carrying on the business of banking or insurance might always be formed with limited liability. [BRAMWELL, B.—We are asked to construe an Act of Parliament with reference to a state of circumstances which the legislature never contemplated. Should we not construe it so as to give it a rational effect,—holding it to mean the *substantial* purpose for which the Company is established, and not that which is merely ancil-

(a) Which provided that “not more than twenty persons should, after the 3d of November, 1856, carry on in partnership any trade or business having gain for its object, unless they were registered as a Company under that Act, or were authorized so to carry on business by some private Act of Parliament or by Royal charter or letters patent, or were engaged in working mines within and subject to the jurisdiction of the stannaries; and if any persons carried on business in partnership contrary to that provision, every person so acting should be severally liable for the payment of the whole debts of the partnership, and might be sued for the same without the joinder in the action or suit of any other members of the partnership.”

lary to the principal purpose? That which the plaintiffs are doing here is nothing more than carrying on their business in the way in which the business of an insurance office is usually carried on.] In *The London Monetary Advance and Life Assurance Company v. Smith*, 3 Hurlst. & N. 543,† the deed is not set out. Here, the purpose of the Company is fully disclosed upon the record, and is clearly that which in popular language and understanding would constitute it an insurance Company and nothing else. [WIGHTMAN, J.—A Company like this clearly could not have been registered under *The Limited Liability Act*, 1855, 18 & 19 Vict. c. 133. BLACKBURN, J.—The terms of the deed are wide enough to enable the Company to carry on business other than that of insurance.]

*Wordsworth, Q. C.*, *contra*.—The question is what is the meaning of “insurance company,” in the 27th section of the *Joint Stock Companies Act*, 1856? Does \*it extend to a Company which, [\*728 besides the legitimate business of insurance, is so formed as to allow it to carry on any trade, that of brewing or brick-making, for instance? It was never intended that a trading Company should be permitted to acquire the privilege of limited liability by merely tacking banking or insurance to its other business. What the Company has done is immaterial; the question is, what does its deed of settlement authorize and empower it to do? The object of the 27th section of the *Act of 1856* was, to compel all Companies to register, other than mere insurance Companies,—to provide for uniformity of action. A Company formed for that and any other purpose is clearly within it. Here, the Company profess to lend money, to grant annuities, to provide allowances for cases of sickness and accouchement, &c. These are clearly quite beside the legitimate purpose of an insurance company. The case of the *London Monetary Advance and Life Assurance Company v. Smith* is precisely in point; and the statute of the last session, which consolidates the law upon the subject of joint stock Companies winding up,—25 & 26 Vict. c. 89,—which by s. 3 enacts, that “for the purposes of that Act, a Company that carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance Company,”—amounts to a legislative declaration that that case was well decided, inasmuch as the legislature have thought fit to alter that state of things. [BLACKBURN, J.—The utmost that can be said, is that the legislature thought that state of things inexpedient.]

*POLLOCK, C. B.*—We are all of opinion that this is an insurance Company, and therefore not required to register under the *Joint Stock Companies Acts*, 1856, 1857; and that the judgment in the case of *The \*London Monetary Advance and Life Assurance Company v. Smith*, 3 Hurlst. & N. 543,† is not to be approved of, [\*729 and, in short, was wrongly decided. The expression of my Brother *Martin* in that case is, that “a Company carrying on the business of insurance and also of lending money, is not a Company formed for the purpose of insurance within the meaning of the 27th section of the *Joint Stock Companies Act*, 1857.” Now, there is no insurance Company in existence that does not lend money: that is, in truth, the only way in which it can deal profitably with its funds. That being so, the necessary consequence is that we agree with the argument of

Mr. *Mellish*, and think our judgment should be in his favour. The argument which has been urged before us by Mr. *Wordsworth*, that The Companies Act, 1862, contains a legislative recognition of the propriety of the decision in the case referred to, is, we think, one which finds no place with persons who are familiar with the construction of statutes. As my Brother Blackburn observed during the argument, all the effects of the 8d section of the 25 & 26 Vict. c. 89, is, that whereas there has been a decision of the Court of Exchequer holding that a Company carrying on the business of insurance and also that of money-lending was incapacitated from suing at law or in equity unless registered under the Joint Stock Companies Act, 1857, —to set the matter right, and to remove all doubt for the future, the 8d section of the recent statute enacts that “a Company that carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance Company.” Upon the whole, we think the judgment of the Court of Common Pleas ought to be reversed.

\*730] BRAMWELL, B.—I am content to concur in the \*judgment that this is an insurance Company. I feel extreme difficulty in saying, that, if the Joint Stock Companies Act, 1857, had stood alone, the consequences mentioned in s. 28 would not have attached to a Company established for another purpose besides that of insurance, unless registered pursuant to s. 27. I cannot say I think the decision of the Exchequer wrong. Judgment reversed.

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## THE LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY v. CHASE and Another. May 30.

The description of the residence and occupation of the person making or giving a bill of sale, required by the statute 17 & 18 Vict. c. 36 to be contained in the affidavit filed with the bill of sale, must be that which fits the party at the time of giving the security, and not at the time of filing it.

An uncertificated bankrupt, following no occupation at the time of granting the bill of sale, may properly be described in the affidavit as a “gentleman,” although at the time of filing the affidavit he carries on the business of a commission agent.

THIS was an interpleader issue to try the right to certain goods which had been seized by the sheriff of Surrey under a writ of *fi. fa.* issued upon a judgment recovered by the defendants in an action against one John Dickinson.

The trial took place before Williams, J., at the first sitting at Westminster in Easter Term last. The question was as to the validity of a bill of sale executed by Dickinson on the 29th of June, 1861, whereby he assigned, for what was admitted to be a good consideration, certain household furniture, being the goods seized under the *fi. fa.*

In the bill of sale, the grantor was described as “John Dickinson, of Montague Lodge, Merton, in the county of Surrey, gentleman.”

A copy of the bill of sale was filed at the proper office on the 16th of July, together with an affidavit \*by the attesting witness,  
\*731] the secretary of the Company, wherein he deposed “that the

said bill of sale was made and given on the day it bears date, being the 29th day of June, 1861, and that I was present and did see John Dickinson in the said bill of sale mentioned, and whose name is signed thereto, sign and execute the same on the said 29th day of June, in the year aforesaid, and that the said John Dickinson resides at Montague Lodge, Merton, in the county of Surrey, and *is a gentleman*."

It appeared from the evidence, that, prior to November, 1860, Dickinson had, in copartnership with another person, carried on the business of a shirtmaker, at Hastings and in Southwark, but had become bankrupt, and was uncertificated; that, for about five weeks in April and May, 1861, he had assisted a bookseller, receiving no remuneration for his services, but only a guinea a week for personal expenses thereby incurred; that, at the date of the bill of sale he followed no occupation; and that, on the 2d of July, he took offices in the Adelphi, where he commenced carrying on the business of a house and general agent.

Upon this evidence, the jury found that Dickinson was following no occupation at the time he executed the bill of sale, but that he was following the occupation of a house and general agent at the time when the bill of sale and affidavit were filed.

The learned Judge thereupon directed a verdict to be entered for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them if the Court should be of opinion that the addition and description of the grantor in the bill of sale (a) and affidavit were a sufficient compliance with the statute 17 & 18 Vict. c. 36, s. 1.

\**Parry*, Serjt., in Easter Term, obtained a rule nisi accord- [\*732 ingly.

*Petersdorff*, Serjt., and *Raymond* now showed cause.—The only material facts are, that Dickinson had *no* occupation when he made the bill of sale, but that, at the time of filing the affidavit, he carried on the business of a house and general agent, and the affidavit states that he "*is a gentleman*." That relates to the state and condition of the party at the time of filing the affidavit. The affidavit, therefore, clearly contained an incorrect and untrue description. The 17 & 18 Vict. c. 36 recites that "frauds are frequently committed upon creditors, by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors:" and s. 1 enacts that "every bill of sale of personal chattels, &c., or a true copy thereof and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and *occupation* of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench, within twenty-one days after the

(a) See *Hatton v. English*, 7 Ellis & B. 94 (R. C. L. R. vol. 90), cited post, p. 734.

making or giving of such bill of sale," otherwise such bill of sale shall be null and void to all intents and purposes whatsoever. There are  
 \*733] many cases both in the Queen's \*Bench and in the Exchequer in which it has been held that the occupation of the grantor *must* be mentioned.(a) In *Tuton v. Sanona*, 3 Hurlst. & N. 280,† it was held not to be a sufficient compliance with the statute to describe as a "gentleman" a witness who, though formerly an attorney, was at the time of the attestation acting as an attorney's clerk.(b) So of one who was a clerk in the audit office,—*Allen v. Thompson*, 1 Hurlst. & N. 15.† [WILLES, J.—The question is whether the exigency of the statute as to the affidavit has reference to the date of the bill of sale or to the time of the filing of the affidavit.] According to the ordinary rules of construction, the description of the party's occupation can only relate to the time when the affidavit is made; otherwise, parties searching may be deceived. [ERLE, C. J.—The searching party would have both documents before him.] What he would see would be simply the bill of sale and the index or register.(c) [BYLES, J.—The word "same" refers to the bill of sale. Suppose the person giving the bill of sale went abroad the next day, how would you describe him when you came to make the affidavit? Could you say "residence unknown?"] That is a difficulty which could not arise if the description has reference to the time of giving the bill of sale. [WILLES, J.—Suppose the affidavit were made on the same day as the  
 \*734] bill of sale, but not filed until twenty days \*afterwards, and the grantor had in the mean time changed his residence or his occupation?] Those cases might present difficulties which do not press here. In *Hatton v. English*, 7 Ellis & B. 94 (E. C. L. R. vol. 90), it was held that it is not sufficient that the bill of sale which is filed itself contains a description of the residence and occupation. And *Wightman, J.*, says: "The terms of the statute do not require that

(a) In *Sutton v. Bath*, 3 Hurlst. & N. 382,† it was held, that, where the occupation of a party to, or the witness of, a bill of sale is not stated, the onus of proving that such party or witness has an occupation lies on the person seeking to impeach the bill of sale on that ground.

(b) And see *Beales v. Tennant*, 29 Law J., Q. B. 188, 6 Jurist, N. S. 628.

(c) See section 3, which enacts that "the said officer of the Court of Queen's Bench shall cause every bill of sale, and every such schedule and inventory as aforesaid, and every such copy filed in his said office under the provisions of this Act, to be numbered, and shall keep a book or books in his said office, in which he shall cause to be fairly entered an alphabetical list of every such bill of sale, containing therein the name, addition, and description of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of process as aforesaid, then the name, addition, and description of the person against whom such process shall have issued, and also of the person to whom or in whose favour the same shall have been given, together with the number, and the dates of the execution and filing of the same, and the sum for which the same has been given, and the time or times (if any) when the same is thereby made payable, according to the form contained in the schedule to this act; which said book or books, and every bill of sale or copy thereof filed in the said office, may be searched and viewed by all persons, at all reasonable times, paying to the officer for every search against one person the sum of 6d., and no more: and that, in addition to the last-mentioned book, the said officer of the said Court of Queen's Bench shall keep another book or index, in which he shall cause to be fairly inserted, as and when such bills of sale are filed in manner aforesaid, the name, addition, and description of the person making or giving the same, or of the person against whom such process shall have issued, as the case may be, and also of the persons to whom or in whose favour the same shall have been given, but containing no further particulars thereof; which last-mentioned book or index all persons shall be permitted to search for themselves, paying to the officer for such last-mentioned search the sum of 1s."

the bill of sale itself should \*contain any description, and do require that a description should be filed together with the bill of sale." [\*735]

*Parry*, Serjt., was not called upon to support his rule.

*ERLE*, C. J.—The question in this case is, whether the bill of sale under which the plaintiffs claimed the goods which are the subject of this issue was duly filed in accordance with the provisions of the statute 17 & 18 Vict. c. 36, s. 1. The bill of sale was made on the 29th of June, 1861. At that time the maker of the bill of sale was of no occupation, and, therefore, according to the terms of the statute and the authority of the decided cases, he might properly be described as a "gentleman." (a) Between the time of the making and the filing of the bill of sale, viz., on the 2d of July, the maker became a commission agent. On the 16th of July, and within the twenty-one days, the bill of sale was filed together with an affidavit "of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same." This affidavit gives a description of the residence (about which there is no question), and of the condition of the maker at the time of giving the bill of sale, in these words "and is a gentleman." It is contended on the part of the defendants, that the statute requires a true description of the occupation of the party *at the time the bill of sale is filed*. I am of a different opinion. The filing of the bill of sale being for the purpose of giving notice to creditors, it seems to me that the more important requirement is the description of the \*residence and occupation at the time of giving the bill of sale. [\*736] The party might change his residence or his occupation between the time of making the bill of sale and the filing; and if it were held that it is the new residence or the new occupation that must be given, an unnecessary difficulty might be thrown in the way of his recognition. The making of the bill of sale and the filing it with the affidavit are in the contemplation of the statute one transaction. The words of the 1st section are perhaps equivocal,—“an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same.” Even as they stand, I think those words are fairly susceptible of the construction I put upon them. But the 3d section seems to me to remove all difficulty. It points strongly to the time when the bill of sale is made: it enacts that the officer shall keep a book or books in which he shall cause to be fairly entered “an alphabetical list of every such bill of sale, containing therein the name, addition, and description of the person making or giving the same,” and also “of the person in whose favour the same shall have been given, together with the number, and the dates of the execution and filing the same, and the sum for which the same has been given, and the time or times (if any) when the same is thereby made payable.” The object being to enable a person searching at once to identify the parties with the document, I think the fair meaning of that section is, that this index shall contain the addition and description at the time of giving the bill of sale. The officer must get at these particulars from the documents before him: what the 3d section calls upon him to do, is, to

(a) *Morewood v. The South Yorkshire Railway Company*, 3 Hurlst. & N. 801.†

insert the name, addition, and description of the person making or  
\*737] giving the bill of sale, not the addition and description \*at the  
time the affidavit is filed. It should be noticed that the Act  
was evidently drawn by a person who had by no means an accurate  
perception of legislative language; for, he does not use the same expres-  
sion throughout the Act to convey the same idea,—the words “addi-  
tion and description” in s. 3 being evidently used as synonymous with  
“description of the residence and occupation” in s. 1. Upon the whole,  
therefore, I come without any misgiving to the conclusion that the  
making the bill of sale and filing it with the required affidavit was  
looked upon as one transaction, and that the true description of the  
residence and occupation is that which belonged to the party at the  
time of giving the security. So far the difficulty of calling the grantor  
a gentleman at the time when he carried on the business of a commis-  
sion agent is got over. But the person making the affidavit has fallen  
into the further difficulty of saying that the grantor “*is* a gentleman,”  
which, it is said, can only relate to the 16th of July, when the affidavit  
was sworn, and therefore it does not satisfy the statute even according  
to the construction I have put upon it. Strictly speaking, no doubt  
the words refer to time present: but I think we may treat it as a  
simple case of mala grammatica: and, further, I think we may very  
well refer the expression to the time of the inchoate proceeding which  
is completed and rendered perfect in binding by the subsequent filing  
of the affidavit. I feel strongly confirmed in this view by considering  
the facilities which would be given to fraud, if the other construction  
were adopted, by a change of residence or occupation between the  
one stage of the proceeding and the other. Upon the best considera-  
tion I can give to the case, therefore, I hold the requirements of the  
statute to have been sufficiently complied with.

\*738] \*WILLIAMS, J.—I thought it better to reserve the point at  
the trial; and my impression then was certainly in favour of  
the defendants. I was pressed by the defendants’ counsel with the  
argument, that, according to the opinion of my Brother Wightman  
in the case of *Hatton v. English*, 7 Ellis & B. 94, the statute intended  
that the affidavit, when filed, should describe the residence and occu-  
pation of the maker of the bill of sale as they exist at the time of  
making the affidavit, and not at the time of making or granting the  
bill of sale. It occurred to me that it was not necessary to decide  
that point, because it might well be that the statute intended to give  
an option, and that the person making the affidavit would comply  
with the direction by giving either. But, if that were so, I appre-  
hend there would be even more difficulty in saying that the require-  
ments of the statute had been complied with, because the affidavit here  
does not profess to describe the occupation of the grantor at the time  
of giving the bill of sale; but, on the contrary, it states that he “*is*,”  
that is, at the time of the making of the affidavit, a “gentleman.” In  
the view I took at the trial, it would have been enough to say “*was*  
a gentleman,” because that would refer to the time when the bill of  
sale was given, and, as the grantor then had no occupation, “gentle-  
man” would have been a sufficient description of him. But here the  
affidavit purported to give a description of the then existing state of  
the grantor, whereas he had between the time of making the bill of

sale and the swearing and filing the affidavit acquired a new occupation: if, therefore, it was intended as a description of the party at the time of making the affidavit, it was a failure. Taking the more liberal view of the statute, therefore, I thought it had not been complied with. But I feel no difficulty in acceding \*to the view taken [\*739 by my Lord and the rest of the Court, that the statute gives no option, but that the description must have reference to the occupation of the party at the time of giving the bill of sale. The difficulty which remains is, that this affidavit does not profess to do that. It is certainly giving the language a somewhat forced construction: but I am not unwilling to adopt it, or to hold that it may be assumed to refer to the time to which by the statute it ought to refer. I must, however, deprecate giving way to arguments of hardship: and I do not shrink from putting a strict construction upon the statute on any such consideration. The Act only affects those vendees who choose to allow the vendors to keep possession of the goods, and so to a certain extent hold out a delusive appearance to the world, when the vendors are insolvent. If the legislature had enacted that all such transactions should be altogether null and void when the goods were left in the possession of the grantor, I should not have thought that more harsh and unjust than are many of the provisions of the bankrupt law which are designed for the protection of creditors against fraudulent and dishonest traders. The legislature have not thought proper to do so. They have, however, imposed certain conditions, upon the performance of which alone bills of sale are to be valid: and I think we have no right to lighten the fetters which the legislature in their wisdom have thought it right to place upon these transactions, by reason of any supposed hardship or difficulty in complying with the conditions.

WILLES, J.—I am entirely of the same opinion.

ERLE, C. J., intimated that BYLES, J., before he left the Court, had desired him to say that he also concurred. Rule absolute.

\*NEVILLE and Another v. KELLY. *June 8.* [\*740

A police constable apprehended a boy (in Bedfordshire) having in his possession a horse and gig under circumstances of suspicion, and, discovering that the boy had absconded with them from Woolwich, gave notice to his superintendent, who within a reasonable time gave notice to the defendant, the boy's master. After the boy's apprehension, but before the master received notice thereof, the latter had issued an advertisement offering a reward of 10*l.* to any one who would give such information as should lead to the recovery of the property and the apprehension of the thief:—

Held, that a plea charging the police constable with a breach of duty in neglecting to inform the defendant of the boy's apprehension until after the issuing of the advertisement, was no answer to an action by the constable for the reward.

THE declaration stated that the defendant caused to be published a certain advertisement headed "Ten Pounds Reward," whereby, after reciting that, on Saturday, the 4th of October, 1861, there had been stolen from 48, Artillery Place, Woolwich, in the county of Kent, a bay mare, a set of old plated harness, and a four-wheel van of the description therein mentioned, and that the same had been stolen by

a boy aged fourteen years, whose description was therein given, the defendant did promise and undertake, that whoever would give such information as would lead to the recovery of the property and the apprehension of the thief, should receive the said reward of 10l.: Averment, that the plaintiffs, confiding in the said promise and undertaking of the defendant, did give such information as led to the recovery of the said property *and to the apprehension* and conviction of the thief,—of all which premises the defendant had notice; but that the defendant, although a reasonable time for the payment of the said reward to the plaintiffs had elapsed before the commencement of this suit, had refused to pay the said reward, or any part thereof, to the plaintiffs.

The defendant pleaded,—first, that he did not promise as alleged,—secondly, a denial that the plaintiffs gave such information as led to the recovery of the property and the apprehension of the thief,—thirdly, that, before the publication of the advertisement in the declaration mentioned, the plaintiffs apprehended the boy in the declaration \*741] mentioned, and kept him \*in custody until after the said publication of the said advertisement; and that, although the plaintiffs were before the said publication informed that the said boy had absconded from the service of the defendant with the property in the advertisement mentioned, and knew where the said defendant was to be found, they, the plaintiffs, contrary to their duty, neglected to inform the defendant of such apprehension, and the defendant, in ignorance of the apprehension, published the advertisement in the declaration mentioned.

Replication to the third plea,—that, before and at the time of the apprehension of the said boy, the plaintiffs were policemen for a certain district in the county of Bedford, and that they apprehended the said boy at Bedford, in the said county of Bedford, and, in the pursuance of their duty as such policemen, informed the chief superintendent of police for the said district of the apprehension of the said boy, and of all the circumstances which had come to their knowledge concerning the said theft, within a reasonable time in that behalf, and that he, in consequence thereof, and at their request, informed the defendant (who was then and at the time of the said apprehension living at Woolwich, in the county of Kent) of the apprehension of the said boy, within a reasonable time in that behalf, and after the publication of the said advertisement; and that such information could not reasonably have been given by the plaintiffs to the said superintendent before it was given, and could not reasonably have been given to or received by the defendant before the time when it was given and received, or before the publication of the said advertisement; and that, according to the rules of the police force legally made and in force at the time of the said apprehension, and from thence hitherto, and which they the plaintiffs were and are bound to \*742] obey, \*it was their duty as such policemen to inform the said superintendent of the said apprehension of the said boy, and that it would have been contrary to their duty as such policemen, and a disobedience of the said rules, if they had themselves informed the defendant of the said apprehension, or informed him thereof except through and by the said superintendent, and that it was the duty of

the said superintendent to inform the defendant thereof; and that they the plaintiffs and the said superintendent performed their duty in the said premises, and did not act contrary thereto, as alleged in the said third plea.

To this replication the defendant demurred.

*Joyce*, in support of the demurrer.—Taking the whole record together, the plaintiffs have clearly no cause of action. The declaration alleges, that, relying on the advertisement, the plaintiffs gave such information as led to the apprehension and conviction of the delinquent. The plea shows that this is not true, for that the boy was already in custody. And the replication does not deny any material allegation in the plea: on the contrary, it admits them all; and the plaintiffs content themselves with discharging themselves from the imputation of having been guilty of a breach of duty. There is no case directly in point: in all of them the entire consideration had been performed. It was in point of fact the inspector who gave the information here; and he should have been joined.

*Macnamara*, contra.—The plaintiffs apprehended the thief, procured his conviction, and recovered the stolen property. The fact of the boy's apprehension having occurred before the issuing of the advertisement does not disentitle the plaintiffs to the reward: the object of the advertisement was attained, and all the conditions fulfilled. In *Smith v. Moore*, 1 C. B. \*438 (E. C. L. R. vol. 50), the defendants, by public advertisement, offered a reward of 20*l.* to any person who would give such information as should lead to the apprehension and conviction of the party or parties who had broken into, robbed, and set fire to their premises. One B., whom the plaintiff had taken into custody on suspicion of being concerned in the offence, offered to make certain disclosures if furnished with something to eat and drink. The plaintiff communicated this offer to a sub-inspector of police, who took B. to a public-house, and gave him refreshment, whereupon B. made a voluntary confession, which resulted in his conviction: and it was held that the plaintiff was entitled to the reward. [ERLE, C. J.—That seems very much in point. BYLES, J.—There the suspended policeman had seen the advertisement before he apprehended the culprit.] Knowledge of the advertisement at the time of the apprehension, and motive for the apprehension, are, it is submitted, immaterial: *Williams v. Carwardine*, 4 B. & Ad. 621 (E. C. L. R. vol. 24). In *England v. Davidson*, 11 Ad. & E. 856 (E. C. L. R. vol. 63), 3 P. & D. 594, it was held not to be contrary to public policy to allow a police constable to sue for a reward. In *Lancaster v. Walsh*, 4 M. & W. 16,† a party who had been robbed of bank-notes put forth a handbill wherein it was stated, that "whosoever would give information whereby the same might be traced, should, on conviction of the parties, receive a reward of 20*l.*:" and it was held that the only person entitled to the reward was he who *first* gave information by which the notes were traced to the robbers, so as to insure their conviction; and that it was not necessary that such information should be communicated to the party robbed, if it was given to a person authorized to receive it and to act upon it in the apprehension of the offenders,—as, to a constable. [BYLES, J.—How can it be said, that the information.

\*744] \*communicated by the plaintiffs led to the apprehension of the delinquent?] In substance it did. [WILLIAMS, J.—Suppose a murderer were already in custody for larceny,—would a person who gave such information as caused his detention and conviction for the murder lose the reward offered, because the guilty person was already in custody?] Clearly not. *Smith v. Moore* is an authority on that point. [BYLES, J.—The plaintiffs had the boy in custody, and knew enough to justify them in detaining him, before the publication of the advertisement.] No doubt: but still it is submitted that they gave such information as led to the recovery of the property and the conviction of the thief, and therefore are entitled to the reward. *Thatcher v. England*, 3 C. B. 254 (E. C. L. R. vol. 54), is an answer to the suggestion that the superintendent should have been made a party to the action. [WILLIAMS, J., referred to the observations made by Lord Campbell, in *Gerhard v. Bates*, 2 Ellis & B. 476, 488 (E. C. L. R. vol. 75), upon *Williams v. Carwardine* and that class of cases.]

*Joyce*, in reply.—There is clearly no consideration to support the promise. The plaintiffs did nothing in consequence of the advertisement: the culprit was already in custody. In *Smith v. Moore*, the offender had not been apprehended on the charge at the time of the publication of the advertisement. Whatever ambiguity there may be in the plea, is cured by the replication.

ERLE, C. J.—I am of opinion that our judgment upon this demurrer must be for the plaintiffs. The advertisement issued by the defendant contains a promise of a reward to whomsoever would give such information as should lead to the recovery of the property and the apprehension of the thief. The plaintiffs in their declaration \*745] allege that they did give such \*information as led to the recovery of the property and the apprehension and conviction of the thief. The defendant by his second plea denies that the plaintiffs gave such information. It may be a question upon that plea whether the circumstances entitle the plaintiffs to recover the promised reward. The third plea alleges, that, before the publication of the advertisement, the plaintiffs apprehended the boy, and kept him in custody until after the publication of the advertisement, and that, although they were before the said publication informed of all the facts, and knew where the defendant was to be found, they, contrary to their duty, neglected to inform the defendant of such apprehension, and the defendant published the advertisement in ignorance of that fact. I construe this plea as charging the plaintiffs with a breach of duty. Accordingly, the plaintiffs reply to it, that they, being policemen, and having apprehended the boy in the declaration mentioned under circumstances of suspicion, detained him, and within a reasonable time, in pursuance of their duty, informed their chief superintendent of all the circumstances which had come to their knowledge concerning the theft, and that the superintendent, after the publication of the advertisement, and within a reasonable time in that behalf, gave notice to the defendant. If that replication be true, it affords a complete answer to the alleged breach of duty and fraudulent pretence alleged in the plea.

WILLIAMS, J.—I am of the same opinion. The third plea in substance amounts to this,—that, before the issuing of the advertisement,

the thief was already in custody on suspicion (not saying that he was in custody upon the charge in question), that the plaintiffs had the means of informing the defendant of the fact, \*and ought to have done so, and that the defendant was thus led to take a [\*746 step which but for their neglect of duty he would not have taken. The replication simply answers the allegation of neglect of duty. Without giving any opinion as to what evidence would be required to support the second plea, I agree with my Lord that the third plea, so understood, is well answered by the replication.

WILLES, J.—I am of the same opinion. The third plea in substance alleges that the plaintiffs conducted themselves fraudulently in concealing the fact that the boy was in their custody, until after the reward was offered. I think that charge is completely answered by the replication. The circumstance of the communication having been made to the defendant through the superintendent has not (as was suggested by Mr. *Joyce*) made the superintendent the person, or one of the persons, giving the information. It clearly appears from the cases referred to by Mr. *Macnamara* (all of which were cited in *Thatcher v. England*, 8 C. B. 254 (E. C. L. R. vol. 54)), that it is the person who gives the first information who is entitled to the reward. It is then said that the plea may be supported upon another ground, viz. that it shows that it is impossible that the allegation in the declaration that the plaintiffs gave such information as led to the apprehension of the thief, can be true, inasmuch as they had him already in custody, and consequently the condition which was to entitle them to the reward had not been performed. If the averments in the plea do amount to that, then, undoubtedly, the plea is good, and the replication no answer. I must say I am very unwilling to read a plea in any other sense than that which it clearly appears to have been intended to bear. To set up that defence in the ordinary manner, would be to \*traverse the giving of the information, as is done in the second plea. We must examine this plea to see if it [\*747 contains an argumentative denial of that allegation. Now, it is a clear principle of pleading, that, where a party, instead of averring or denying any material facts which it is necessary to aver or to traverse, thinks fit to set out evidence, unless the evidence so set out conclusively establishes the fact alleged or denied, the plea fails: and properly so. That rule is not confined to common-law pleadings; and it is one which I apply with satisfaction to this plea. For the purpose of testing the plea, I will put a case which is not excluded by it, and which if true would show that the allegation in the declaration is true. I will suppose that the boy was apprehended upon another charge, or upon imperfect information on this charge. If the decision in *Hogg v. Ward*, 3 Hurlst. & N. 417,† be correct, information alone would not be enough; the grounds of suspicion must be such as a reasonable man would act upon. One would have thought it enough if the policeman *bonâ fide* believed the information to be true; but so is the decision in *Hogg v. Ward*. Now, add the fact that the magistrates issued a warrant, under which the policemen apprehended the boy and took him to Woolwich. It is clear, that, in that case, the defendant would have been liable; and that is not excluded by the third plea. As a plea of fraud or breach of duty, it is clearly answered

by the replication, and therefore the plaintiffs are entitled to judgment on this demurrer.

BYLES, J.—The question upon this demurrer is, whether the plaintiffs were guilty of a breach of duty in withholding the information they possessed, until after the offer of a reward. I cannot clearly see \*748] my way to a different conclusion, and therefore defer to the \*judgment of the rest of the Court. And I the rather do this because there is a plea upon the record which more conveniently raises the question in the cause.

Judgment for the plaintiffs.(a)

(a) The issue of fact was not tried, the defendant having become insolvent.

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### OFFORD v. DAVIES, and Another. June 2.

Held, that a guarantee to secure moneys to be advanced to a third party on discount, to a certain extent, "for the space of twelve calendar months," is countermandable within that time.

But see *Bradbury v. Morgan*, 31 Law J., Exch. 462.

THIS was an action upon a guarantee

The first count of the declaration stated, that, by a certain instrument in writing signed by the defendants, and addressed and delivered by the defendants to the plaintiff, the defendants undertook, promised, and agreed with the plaintiff in the words and figures following, that is to say,—“We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guaranty *for the space of twelve calendar months* the due payment of all such bills of exchange, to the extent of 600*l.*: And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys.” Averment, that the plaintiff, relying on the said promise of the defendants, after the making of the said promise, and within the space of twelve calendar months thereafter, did discount divers bills of exchange for the said Messrs. Davies & Co., of Newtown aforesaid, certain of which bills of exchange became due and payable before the commencement of this suit, but were not then or at any \*749] other time duly paid, and the said bills \*respectively were dishonoured; and that the plaintiff, after the making of the said promise, and within the said twelve calendar months, advanced to the said Messrs. Davies & Co. divers sums of money on and in respect of the discount of the said last-mentioned bills so dishonoured as aforesaid, certain of which moneys were due and owing to the plaintiff before and at the time of the commencement of this suit; and that all things had happened and all times had elapsed necessary, &c.; yet that the defendants broke their said promise, and did not pay to the plaintiff or to the respective holders for the time being of the said bills of exchange so dishonoured as aforesaid, or to any other person entitled to receive the same, the respective sums of money payable by the said bills of exchange; nor did the defendants pay to the plaintiff

the said sums of money so advanced by the plaintiff as aforesaid, or any part thereof; whereby the sums payable by the said bills of exchange so dishonoured as aforesaid became lost to the plaintiff, and he became liable to pay and take up certain of the said bills of exchange, and did pay and take up certain of the said bills of exchange, and was forced and obliged to and did expend certain moneys in endeavouring to obtain part of certain of the said bills of exchange, and the plaintiff lost the interest which he might have made of his moneys if the said bills had been duly paid at maturity.

Fourth plea, to the first count,—so far as the same relates to the sums payable by the defendants in respect of the sums of money payable by the said bills of exchange and the said sums so advanced,—that, after the making of the said guarantee, and before the plaintiff had discounted such bills of exchange, and before he had advanced such sums of money, the defendants countermanded the said guarantee, and \*requested the plaintiff not to discount such bills of exchange, and not to advance such moneys. [\*750

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, “that the fourth plea offers no defence to that part of the declaration to which it is pleaded, for that a party giving a guarantee [for a definite period] has no power to countermand it without the assent of the person to whom it is given.” Joinder.

*Prentice* (with whom was *Brandt*), in support of the demurrer.—A guarantee like this, to secure advances for twelve months, is a contract which cannot be rescinded or countermanded within that time without the assent of the person to whom it is given. [BYLES, J.—What consideration have these defendants received?] For anything disclosed by the plea, the plaintiff might have altered his position in consequence of the guarantee, by having entered into a contract with *Davies & Co.* of Newtown to discount their bills for twelve months. In *Calvert v. Gordon*, 1 M. & R. 497 (E. C. L. R. vol. 17), 7 B. & C. 809 (E. C. L. R. vol. 14), 3 M. & R. 124, it was held that the obligor of a bond conditioned for the faithful service of A. whilst in the employ of B., cannot discharge himself by giving notice that after a certain period he will be no longer answerable; nor can the personal representative of the obligor discharge himself by such a notice. (a) Lord Tenterden, in giving judgment in that case, says (3 M. & R. 128): “The only question raised by the defendant’s second plea is, whether it is competent to the surety to put an end to his liability by giving a notice which is to take effect from the very day on which it is given. It would be a \*hardship upon the master if this [\*751 could be done. It is said that it would be a hardship on the surety if his liability must necessarily continue during the whole time that the principal remains in his service; but, looking at the instrument itself, it would appear that it was the intention of the testator to enter into this unlimited engagement. It was competent to him to stipulate that he should be discharged from all future liability after a specified time after notice given. This he has not done.” Here, the defendants have stipulated that their liability shall discontinue at the end of twelve calendar months. What pretence is there for relieving

(a) And see *Gordon v. Calvert*, 2 Sim. 253, 4 Russ. 581, where an injunction to restrain proceedings at law upon the bond was dissolved.

them from that bargain? [BYLES, J.—Suppose a man gives an open guarantee, with a stipulation that he will not withdraw it,—what is there to bind him to that?] If acted upon by the other party, it is submitted that that *would* be a binding contract. *Hassell v. Long*, 2 M. & Selw. 363, is an authority to the same effect as *Calvert v. Gordon*. In Pothier on Obligations, Part II., c. 6, § 7, art. 2, p. 442, it is said: “When the obligation to which a surety has acceded must from its nature exist a certain time, however long it may be, the surety cannot within that time demand that the principal debtor should discharge him from it; for, as he knew, or ought to know, the nature of the obligation to which he acceded, he should have reckoned upon continuing obliged during the whole of the time.” Again, Part III., c. 6, art. 4, p. 635,—“Regularly, lapse of time does not extinguish obligations: persons who enter into an obligation oblige themselves and their heirs until the obligation is perfectly accomplished. But there may be a valid agreement that an obligation shall only continue to a certain time. For instance, I may become surety for a person upon condition that my undertaking shall not bind me after the expiration of three years.”

\*752] *E. James, Q. C.* (with whom was *T. Jones*), *contra*.—The cases upon bonds for guarantying the honesty of clerks or servants are inapplicable: there, the contract attaches as soon as the clerk or servant enters the service, and it is not separable. This, however, is not a case of contract at all. It is a mere authority to discount, and a promise to indemnify the plaintiff in respect of each bill discounted; and it was perfectly competent to the defendants at any time to withdraw that authority as to future transactions of discount. This is more like the *mandatum pecuniæ credendæ* treated of by Pothier,—on Obligations, Part II., c. 6, s. 8, art. 1. If so, it is subject to all the incidents of a mandate or authority. [WILLES, J.—*Mandatum* does not mean a bare authority which may be revoked.] In Story on Agency, the learned author having stated in § 463, that, “in general, the principal has a right to determine or revoke the authority given to his agent, at his own mere pleasure,” proceeds in § 464, “The civil law contained an equally broad doctrine. *Si mandavero, exigendam pecuniam, deinde voluntatem mutavero, an sit mandati actio vel mihi, vel hæredi meo?* Et ait Marcellus: *Cessare mandati actionem, quia extinctum est mandatum, finitâ voluntate*. The same principle has infused itself into the jurisprudence of modern Europe, as, indeed, it could not fail to do, since it is but an application of a maxim founded upon the natural rights of men in all ages, in regard to their own private concerns, when the law has not interfered to prohibit the exercise of them.” “But,” § 466, “let us suppose that the authority has been in part actually executed by the agent; in that case, the question will arise, whether the principal can revoke the authority, either in the whole or as to the part which remains unexecuted. The true principle would seem to be, that, if the authority

\*753] admits of severance or of being revoked as to the part which is unexecuted, either as to the agent or as to third persons, then and in such case the revocation will be good as to the part unexecuted but not as to the part already executed.” A mutual agreement to rescind can only be necessary where there is a mutual contract. But,

in a case like this, where there is no complete contract until something is done by the mandatory, the assent of both parties cannot be required. Suppose Davies & Co. of Newtown had become notoriously insolvent, would the defendants continue bound by their guarantee, if the plaintiffs, with notice of that fact, chose to go on discounting for them? [WILLIAMS, J.—Suppose I guaranty the price of a carriage to be built for a third party, who, before the carriage is finished, and consequently before I am bound to pay for it, becomes insolvent,—may I recall my guarantee?] Not after the coach-builder has commenced the carriage. [ERLE, C. J.—Before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach-builder has prepared the materials, he would probably be found by the jury to have contracted.] In an American work of considerable authority, Parsons on Contracts, p. 517, it is said: “A promise of guarantee is always revocable, at the pleasure of the guarantor, by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce. If the promise be to guaranty the payment of goods sold up to a certain amount, and, after a part has been delivered, the guarantee is revoked, it would seem that the revocation is good, unless it be founded upon a consideration which has been paid to the guarantor for the whole amount, or unless the seller has, in \*reliance on the guarantee, not only delivered a part to the [\*754 buyer, but bound himself by a contract enforceable at law to deliver the residue.” *Brocklebank v. Moore*, cor. Abbott, C. J., Guildhall Sittings after Trinity Term, 1823, referred to in 2 Stark. Evid., 3d edit. 510 n., is a direct authority that “a continuing guarantee is countermandable by parol.” And the same principle is clearly deducible from *Mason v. Pritchard*, 12 East 227. [WILLIAMS, J.—That would have been applicable, if this had been a guarantee for 600l., with no mention of the twelve calendar months.] The mention of twelve months would not compel the plaintiff to go on discounting for that period. In *Holland v. Teed*, 7 Hare 50, under a guarantee given to a banking-house consisting of several partners, for the repayment of such bills drawn upon them by one of their customers as the bank might honour, and any advances they might make to the same customer, within a certain time, it was held that the guarantee ceased upon the death of one of the partners in the bank before the expiration of the time to which the guarantee was expressed to extend; that bills accepted before the death of the partner, and payable afterwards, were within the guarantee; and that the amount guaranteed could not be increased by any act of the continuing firm and the customer after the death of the partner, although such amount might be diminished by such act. [BYLES, J.—The case of a change in the firm is now provided for by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 4.(a) \*ERLE, C. J.—What meaning do you attribute to the words “at our request” in this guarantee?] As and when [\*755

(a) “No promise to answer for the debt, default, or miscarriage of another, made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person

we request. The notice operated a retraction of the request, and any discount which took place after that notice was not a discount at the request of the defendants.

*Brandt*, in reply.—The Court of Exchequer have decided in this term, in a case of *Bradbury v. Morgan*,<sup>(a)</sup> that the death of the surety does not operate a revocation of a continuing guarantee. If that be so, it is plain that the guarantee is not a mere *mandatum*, but a contract. In *Gordon v. Calvert*, 2 Sim. 253, 4 Russ. 581, the executrix of the deceased surety gave notice to Calvert & Co., the obligees, that she \*756] would no longer \*consider herself liable on the bond: but the Vice-Chancellor (Sir L. Shadwell) said, that, “by the original contract, the liability of the surety was to continue as long as Calvert & Co. kept Richard Edwards, or he chose to remain in their service; that, after Calvert & Co. had received the plaintiff’s letter, they never gave her any intimation that they did not consider her as continuing liable under her husband’s bond; that their conduct did not operate in any manner upon her; and that therefore the injunction ought to be dissolved.” That shows, that, in the opinion of that learned Judge, the assent of the three persons concerned and interested in the bargain would be requisite to its dissolution. The fourth plea does not allege that notice of revocation was given before any bills had been discounted by the plaintiffs. It must therefore be assumed that some discounts had taken place. [*T. Jones*.—The fact undoubtedly is so.]

*Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court: (b)—

The declaration alleged a contract by the defendants, in consideration that the plaintiff would at the request of the defendants discount bills for Davies & Co., not exceeding 800*l.*, the defendants promised to guaranty the repayment of such discounts *for twelve months*, and the discount, and no repayment. The plea was, a revocation of the promise before the discount in question; and the demurrer raises the question whether the defendants had a right to revoke the promise. We are of opinion that they had, and that consequently the plea is good.

\*757] \*This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants, or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants

making such promise, in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise.”

(a) Since reported, 31 Law J., Exch. 462. There the guarantee was in the following terms:—“Messrs. Bradbury & Co.,—I request you will give credit in the usual way of your business to H. L.; and, in consideration of your doing so, I do hereby engage to guaranty the regular payment of the running balance of his account with you, *until I give you notice to the contrary*, to the extent of 100*l.*.” and it was held that the liability was not determined by the death of the surety, but that his executors were liable to Bradbury & Co. for goods sold and credit given to H. L. subsequently to the surety’s death,—on the ground (contrary to the doctrine laid down in *Smith’s Mercantile Law*, 4th edit. 425, 6th edit. 477, and adopted in *Williams on Executors*, 5th edit. 1604) that the guarantee was a contract to be answerable to the extent stipulated, for credit given to the principal debtor, until the creditors should receive a notice to put an end to it.

(b) The case was argued before Erle, C. J., Williams, J., Willes, J., and Byles, J.

have the power of revoking it. In the case of a simple guarantee for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then, are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that some discounts had been made before that now in question, and repaid? We think not.

The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and, after repayment, leaving the promise to have the same operation that it had before any discount was made, and no more.

Judgment for the defendants.

**\*In the Matter of the Complaint of JOSEPH BAXENDALE** [\*758  
and Others, carrying on Business under the Firm of Pick-  
ford & Co., Common Carriers, *against* THE LONDON AND  
SOUTH WESTERN RAILWAY COMPANY. *June 17.*

Injunction against a railway Company under the 17 & 18 Vict. c. 31, to restrain them from requiring other carriers to bring their goods to the railway station at an earlier hour than they received their goods delivered at their own receiving-offices.

Where a railway Company has so acted as to render it necessary and proper for any person to come to the Court for redress under the Railway and Canal Traffic Act, the Court will, as a general rule, make the rule absolute with costs.

BOVILL, Q. C., on a former day in this term, on behalf of Messrs. Baxendale & Co., common carriers, obtained a rule calling upon The London and South Western Railway Company to show cause why a writ of injunction should not issue against them, pursuant to The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), to restrain the said Company from violating or contravening the said Act, and enjoining obedience to the same; and to restrain the said railway Company from subjecting the complainants and their traffic respectively to undue and unreasonable prejudice and disadvantage, in refusing to receive their goods at the said Company's station at Nine Elms after the time fixed by the said Company, namely, 6.30 P. M., whilst they received at such station at a later time goods collected by themselves; and to restrain the said Company from giving an undue and unreasonable preference and advantage to and in favour of themselves, by receiving goods at their said station at Nine Elms collected by themselves after the time at which they will receive the complainants' goods and goods collected and taken to such station by the complainants to be carried on the railway of the said Company; and to restrain the said Company from subjecting the complainants to any undue or unreasonable prejudice or disadvantage in any respect whatever in respect of the matters referred to in the affidavits upon which the rule was founded, or the receiving of goods from the complainants at the \*said Nine Elms station to be carried on the railway of [\*759 the said Company,—with costs.

The material affidavits upon which the motion was founded were those of James Ward, one of the chief managers of the complainants' business, and of John Chambers, their manager at Nine Elms.

Ward's affidavit stated, in substance, that the complainants are common carriers carrying on business in London, and are in the habit of receiving goods at their receiving-houses in Gresham Street and other places in London, and of collecting goods from their customers in London, to be forwarded by railway from London to Southampton, Portsmouth, Guildford, and other places on the defendants' railway; that the defendants have a station at Nine Elms for the receipt of goods required to be forwarded by their railway to any of the places before mentioned, and the complainants are in the habit of carting to the said station the goods so received by them, paying the Company for the carriage of such goods on their railway from station to station, and charging their customers the sums paid to the Company for such carriage, together with an additional sum for cartage, which last-mentioned charge for cartage is a source of profit to the complainants; but that the Company required the complainants to deliver such goods at the said station by or before 6.30 P. M., and refused to receive them after that time; that it takes the complainants about one hour to cart goods from their receiving-houses to the station at Nine Elms, but the Company refused to receive their goods there after that hour, and the complainants were consequently compelled to close their said receiving-houses at 5.30 P. M.; that the Company, in order to obtain the profit derived from carting goods to their station at Nine Elms, have established booking-offices, viz., the Blossoms Inn, in Lawrence

\*760] Lane, Cheapside, and also the Swan with two Necks, in Gresham Street; that, being informed that the Company were in the habit of receiving at their station at Nine Elms as late as 9 P. M. goods which had been received by them at the Blossoms Inn and the Swan with two Necks, and that they forwarded such goods by their railway by the same night's train, whereby they were enabled to collect goods to a much later hour than the complainants could, and whereby they were enabled to receive and did receive goods at a much later hour than the complainants could do at their receiving-houses, the deponent on the 14th of April, 1862, wrote to the directors, in the name of the complainants, as follows,—“Gentlemen,—We beg to draw your attention to the fact that the vans belonging to the Company and their agents, loaded with goods, are received at Nine Elms up to 8 or 9 o'clock, sometimes later, and the goods forwarded same night to their respective destinations, and that your receiving-houses in the city are kept open for the reception of goods to be forwarded by the Company by that night's trains, until half-past 6 or 7, your vans on many occasions leaving them much later; whereas, our vans are refused admittance into your station after half-past 6, thereby necessitating the closing of our receiving-houses by half-past 5, as it takes nearly an hour to cart from thence to Nine Elms. As the Company by these means give themselves an undue preference both in the receiving goods at a later hour than we can at their receiving-houses, and in carting goods from their customers' houses to the station also at a later hour than they will permit us, and subject us to an undue and unreasonable disadvantage, we call upon them at once to discon-

tinue the practice, and either refuse to receive at the station and forward goods coming from their receiving-houses or carted in [\*761 \*by themselves from the houses of their customers at a later hour than they admit our vans, or else to admit our vans at the station to as late an hour as they do their own. If this request is not complied with, we shall be compelled to seek our remedy in a Court of law, under the Railway and Canal Traffic Act." And that, notwithstanding this notice, the Company still persisted in the practice complained of, in order that they might themselves obtain the cartage of all goods carried by their railway, and deprive the complainants of the benefit thereof.

Chambers's affidavit stated, amongst other things, that the ordinary goods train running on the Company's line leave the Nine Elms Station every night(?) between the hours of 1 and 7, and that goods which are not forwarded from the station by those trains have to wait for the goods trains leaving at the same time the next night; that, on the evenings of the 10th, 11th, 12th, 14th, 15th, 16th, and 17th days of April last, the deponent went to the station of the Company at Nine Elms to ascertain up to what hour the Company received goods there brought in their own vans to be forwarded by their railway; that he then saw their servants receive several loads of goods in their own vans or in vans hired by them up to 9.45, some of which vans arrived at 6.45, some at 7.10, some at 7.30, some at 8, some at 8.5, some at 8.10, some at 8.15, some at 8.20, and some at 8.45, respectively, and one at 9.45; that, on each of the last-mentioned evenings, the deponent saw that all the said goods which arrived in the said vans were placed on the platform to be loaded into the trucks of the Company, and at 5 o'clock on the following morning, when he was again at the station, he saw that all the said goods had been despatched from the said station: that, on each of the last-mentioned evenings except the 11th of \*April, all the complainants' said goods were delivered [\*762 to the Company at their said station by 6.30, as insisted on by them; that, on the evening of the 11th of April, when the deponent was at the goods station at Nine Elms, one of the complainants' vans arrived there at about 6.50, with a load of goods to be forwarded by the train leaving the same night, and the deponent explained to the goods superintendent of the Company that the reason why the said van arrived after 6.30 was, that there had been a stoppage of vehicles upon London Bridge, and the deponent told him that it was most important to the complainants that the goods should be forwarded that night, but the superintendent refused to receive them, and the deponent was consequently compelled to send them to one of the complainants' receiving-houses in London for the night, and they were delayed in London until the following evening; that, after the Company's superintendent had refused to receive the said van-load of the complainants' goods, the deponent saw as many as twenty-eight vans or carts containing goods collected or received by the Company arrive at the Nine Elms station, at various times up to 9.45, and he saw all the goods in those vans received and placed on the platform, and that all of them were gone when the deponent went to the station on the following morning as before stated.

The learned counsel referred to *Garton v. The Bristol and Exeter*

Railway Company, 6 C. B. N. S. 639 (E. C. L. R. vol. 95), and *Garton v. The Bristol and Exeter Railway Company*, 1 Best & Smith 112 (E. C. L. R. vol. 101).

*Lush, Q. C.*, and *C. Wood* showed cause.—The substance of the complaint on the part of Messrs. Baxendale, is, that the Company require them to bring their goods to the Nine Elms station before 6.30 P. M., which \*763] \*has the effect of closing their receiving-houses at 5.30 P. M., whilst the Company (as it is alleged) forward on the same day goods brought to the station by their own people at a much later hour. The affidavits in answer, (a) it is submitted, show that no undue

(a) These were the affidavits of Archibald Scott, the Company's traffic manager, William Henry Mills, manager of the Company's receiving-office at the Blossoms Inn, and George Hitchens, the manager of Messrs. Chaplin & Horne, carriers, at the Swan with two Necks.

The material paragraphs of Mr. Scott's affidavit were the following:—

"1. That the said Company are proprietors of railways from London to Southampton, Portsmouth, Gosport, Dorchester, Weymouth, Poole, Salisbury, Yeovil, Exeter, Windsor, and numerous other places, and that a large tonnage of goods is conveyed by them daily along such railways:

"2. That, as traffic manager, it is my duty to make arrangements for the proper conveyance of such goods:

"3. That goods are conveyed by various trains to about two hundred stations on the South Western system, and other lines in connection therewith, and for this purpose goods received at Nine Elms from early hours in the morning to 6.30 P. M. are received at the Nine Elms station from all parties who may offer them for conveyance:

"4. That it is necessary to appoint an hour which will be the latest time at which goods can be received for conveyance to the various places, as the said railway Company would be liable for the forwarding of such goods by the appointed trains, and for any undue delay that might arise:

"5. That, having regard to the convenience of the public and the quantity of goods to be conveyed daily, and to the numerous stations to which they have to be forwarded, and the hours at which the various trains are appointed to leave the Nine Elms station, the hour of 6.30 P. M. is the latest hour which can be named; and the said Company have for many years past fixed such hour accordingly:

"6. That, up to such hour, goods are received from all parties whatsoever, and after such hour no goods are received from any party at the Nine Elms Station:

"7. That the said hour of 6.30 P. M. is the latest time fixed for admitting vans with goods into the station yard at Nine Elms, and at such hour the gates are closed; but, at such hour, as a general rule, the station yard is full of vans, all of which have thereafter to be unloaded, and the goods weighed, sorted, and invoiced, which occupies several hours:

"8. That the said railway Company have numerous receiving-houses in London, where goods are also received for conveyance by railway up to the hour of 6 P. M.; and goods received at such houses up to that hour are conveyed to Nine Elms with all possible despatch during each day by vans the property of such railway Company, and, when necessary, also by vans hired by the said railway Company, for the purpose of additional despatch:

"9. That, in some instances, when the traffic is very heavy, the railway Company having no control whatever over the quantity of goods that may be brought to such receiving-houses, may be unable, notwithstanding every exertion, to get all goods received at such receiving-houses up to 6 P. M. carted to the Nine Elms station by 6.30 P. M.; but every exertion is at all times made to do so:

"10. That when, from pressure of business, any vans the property of the said railway Company arrive at Nine Elms station with goods at a later hour than 6.30 P. M., such vans are admitted into the station yard, that being the home of the vans, as they could not be kept all night in the street: but it does not follow that the goods brought by the said vans will be forwarded by that night's trains; but their receipt and forwarding by that night's goods trains depends upon circumstances, and is not guaranteed; whereas, on the contrary, all goods brought to the station up to 6.30 P. M. by any party whatsoever, are guaranteed to be forwarded by that night's goods train;

"11. That, on the 5th of May, 1862, in consequence of a letter received from the attorneys of the complainants, I addressed a letter to them inquiring in what particular instances the complainants had to complain of illegal restrictions towards them: and that I received a reply on the 8th, merely stating that what the complainants complained of was a matter of daily occurrence, but giving no particular instances of such, and therefore affording me no information to enable me to make inquiry thereon, to ascertain the real facts of the case:

\*advantage to themselves has been usurped by the Company, and no undue prejudice imposed upon the complainants. The case of *Garton v. The Bristol and Exeter Railway Company*, 6 C. B. N. S. 639 (E. C. L. R. vol. 95), is altogether different from this. There, the Company employed an agent whose interest was identified with theirs, and to whom were afforded facilities for the receiving and forwarding of goods which were denied to all other carriers; and this was held to be an undue prejudice: and the case of *Garton v. The Bristol and Exeter Railway Company* (in the Queen's Bench), 1 Best & Smith 112 (E. C. L. R. vol. 101), was a mere confirmation of that decision. There is nothing to prevent a railway Company from making such regulations as they please for the receiving and forwarding of traffic on their lines: and, to induce the Court to interfere in a summary way under this Act of Parliament, it must be clearly shown that there is an intentional violation of its provisions. It appears that the vans of the Company were occasionally admitted into the station-yard after the prescribed time. But they were not bound, because late, to bring them home empty; and it is not shown that the goods so received were of right forwarded to their destination the same night. [WILLES, J.—Do your affidavits show on how many occasions goods so admitted into the station after the time limited by the Company's regulations were not forwarded the same night? or that any were left behind?] No. The affidavits upon which the motion is founded do not call the Company's attention to any particular case; and the Company's affidavits deny the charge with as much certainty and precision as its vagueness would admit of. [\*764 [\*765 [\*766 [\*767]

*Bovill, Q. C., and C. Pollock*, in support of the rule.—The affidavits

"13. That, from the information contained in Chambers's affidavit, it is not possible for me to trace such goods so as to ascertain to what stations they were to be forwarded; but it is quite possible, and indeed very likely, for the reasons before stated by me, that such goods were for other stations than the goods so brought to the station by the complainants, and to be forwarded by later trains:

"14. That, although the said John Chambers did not find the said goods on the platform the next morning, it is quite possible, and more probable, that such goods were not forwarded by the previous night's trains, but placed in wagons to be forwarded on the following day:

"15. That the arrangements of the said railway Company with respect to the receiving of goods at the said Nine Elms station, and the forwarding of such goods from thence, are not made and never have been made by the said railway Company with a view to their own exclusive profit, or to give any undue or improper preference to themselves, but have been fixed from time to time with a view solely to the general convenience of the public, and to apply equally to all parties under like circumstances:

"16. That I believe the said railway Company has not violated or contravened the Railway and Canal Traffic Act, 1854, or subjected the said complainants and their traffic respectively to undue and unreasonable prejudice and disadvantage in refusing to receive their goods at the said Company's station at Nine Elms after the time fixed by the said Company, viz. 6.30 P.M."

The affidavit further stated that a notice was affixed at the Blossoms Inn office, and published in the Company's time-tables every month, intimating to the public that goods could not be received at the Blossoms Inn receiving-house after 6 P.M., or at the Nine Elms station after 6.30 P.M.

The other deponents, Mills and Hitchens, severally deposed that the general and unvaried course of business at their respective offices, was, to receive from all parties whatsoever goods for conveyance by the London and South Western Railway up to 6 P.M. of each day, to insure their being forwarded by the goods trains of that night; and that the general and unvaried course of business when goods are brought by any party whatsoever after 6 P.M., is, to receive such goods to be fetched away by the vans of the Company when called for, but not to insure their being forwarded by the railway by the goods trains of that night.

filed on behalf of the Company afford no answer whatever to the charge made against them. This matter has already been decided by the two cases referred to. In the case in this Court, the Bristol and Exeter Railway Company closed their goods station at 5.15 P. M. against all persons except their agent Wall, who had a receiving-house about a mile distant from the station, and from whom the Company received goods up to 8 P. M. For the conveyance of goods from the receiving-house to the station, Wall charged 1s. 8d. per ton on all goods above 3 cwt., and 3d. for each package below that weight. The Court held, upon the complaint of a rival carrier, that the refusal to receive goods sent by him to the station after 5.15 P. M., unless sent through the receiving-house of Wall, was imposing upon him an undue prejudice, within the statute, although it was sworn on the part of the Company that the goods so brought to the station by Wall came there properly classified, weighed, and prepared for loading. And this was followed by the Court of Queen's Bench in 1 Best & Smith 112 (E. C. L. R. vol. 101). There, a railway Company carrying on business as common carriers for hire refused to receive the goods of the plaintiffs (also carriers), on the ground that they were tendered after 5.15 P. M., although they did receive goods from their agent Wall at a later hour: and it was held, that, in the absence of explanation, this was unlawful conduct on the part of the Company, and ground for an action. Cockburn, C. J., in delivering judgment, says: "The substance of the complaint is, that the defendants imposed \*768] an unreasonable condition, namely, that the goods should be brought to them at an unreasonable time, when they received those of other persons after the time they had fixed for the plaintiffs: here again, therefore, a condition is imposed on which the defendants had no right to insist, and the plaintiffs accordingly are entitled to our judgment." [ERLE, C. J.—You do not specifically show that the Company forward on the same day goods received from their receiving-houses after the time fixed for closing. You make a general charge: and the Company's servants say they cannot trace what becomes of the goods you refer to.] In our letter to the secretary of the 14th of April, 1862, we complain of it as their constant practice. Chambers's affidavit distinctly calls the Company's attention to what was done between the 10th and the 17th of April, and was calculated to invite inquiry. [ERLE, C. J.—The Court are disposed to think that the rule must be made absolute, but desire to know whether the complainants press for costs.] After the two distinct decisions, one in this Court and one in the Court of Queen's Bench, it is submitted that the Company's conduct was without excuse, and that, as they compelled the complainants to come for the rule, and then offer an answer which is clearly evasive, there can be no good reason why the complainants should not have the costs which they have necessarily incurred in seeking redress for an admitted wrong.

ERLE, C. J.—We will take time to consider the question of costs.

*Cur. adv. vult.*

ERLE, C. J., now said:—We have already expressed our opinion that this rule must be made absolute. We think that the facts not \*769] denied by the South \*Western Railway Company bring the case within the principle of Garton and The Bristol and Exeter

Railway Company, 6 C. B. N. S. 639 (E. C. L. R. vol. 95), and therefore call for the interference of the Court, as prayed. We also think, on consideration, that the rule must be made absolute with costs. But, in adding this term to the rule, we do not at all mean to adopt the views suggested by Mr. *Bovill*, or to express any doubt as to the sincerity of the affidavits made by those employed by the Company, which declare their ignorance of having acted improperly, and the absence of any intention on their part to diminish the profits of the applicants or aggravate those of the Company. But we give the costs, because we think it of importance not to depart from the rule which this Court has previously adopted, that, when a Company has so acted as to make it proper for any person to come to this Court for relief under the statute, that relief ought to be obtained at the costs of those whose acts have occasioned the application.

The Court think it right to add, that, by making this rule absolute, they do not intend to dictate any particular course to be pursued by the Company, but only that they should take such steps as may be necessary so as to avoid departing from the rule laid down.

Rule absolute, with costs.

\*POOLE v. WHITCOMB. *June 26.*

[\*770

The jury having found a verdict for five guineas in an action for a trifling assault, evidently acting upon information given to them by the plaintiff's counsel that a verdict for less would not give the plaintiff her costs,—The Court granted a new trial without imposing any terms.

THIS was an action for an assault, which was tried before Crompton, J., at the last Gloucester Assizes.

It appeared that the plaintiff had for some time filled the position of housekeeper to the defendant; that, some disagreement having occurred between them, the defendant offered the plaintiff the wages due to her, and dismissed her: and that, as she refused to go, he caused her,—according to her statement, with considerable violence; according to the evidence of the defendant's witnesses, with no more force than was necessary,—to be placed in a cart and driven away.

In the course of his address to the jury, the learned counsel for the plaintiff informed them, that she would probably not have her costs unless they gave her a verdict for at least five guineas.

The learned Judge in his summing up cautioned the jury, if they found for the plaintiff, to give her such damages as they thought she was entitled to for the assault, but that they must not permit themselves to be influenced by a notion as to what sum would carry costs.

The jury returned a verdict for the plaintiff, damages, five guineas.

*Huddleston*, Q. C., in Easter Term last, obtained a rule nisi for a new trial, on the ground "that there had been a mis-trial, and that the jury did not exercise an independent judgment in finding their verdict for the plaintiff for five guineas, the counsel for the plaintiff having told them that a verdict for 5*l.* or less than 5*l.* would throw the costs and expenses of the trial \*upon her, and because the damages found were excessive and contrary to the evidence, [\*771 the jury being influenced by the statement of counsel."

*J. J. Powell and Griffiths* now showed cause.—The counsel for the plaintiff was justified upon principle as well as upon authority in telling the jury what damages they must give her if they wished her to have her costs. The plaintiff was in a respectable position in life, and was proved to have been treated, to say the least of it, with extreme indignity; and there is no pretence for saying that the damages the jury awarded her were excessive, or that the caution which the learned Judge thought fit to give them was disregarded by them. It is laid down by Lord Coke,—Co. Litt. 257 a, and *Pilford's Case*, 10 Co. Rep. 116 b, 117 a,—that costs are included in the word *damages*. Juries have a right to consider them as well as damages; and it is only by usurpation of the Courts that they have become severed. In *Browne v. Gibbons*, 1 Salk. 206, “it was said by Richardson to be the resolution of all the Justices of B. R. and C. B., that, in an action upon the case for slander, though the Courts are bound by 21 Jac. 1, c. 16, and cannot increase the costs where the damages are under 40s., yet the jury are not bound by that statute, and therefore they may give 10l. costs where they give but 10d. damages.” So, in *Hullock on Costs*, p. 3, it is said, that, “as the costs found by the jury were in a legal sense part of the damages, the fact of the amount being increased did not change their character, and so the whole amount of costs, both those found by the jury and the increased costs, were and still are in a legal sense damages,”—*Deacon v. Morris*, 2 B. & Ald. 393. The law is similarly stated in *Gray on Costs*, 1–3. In *Phillips v. Bacon*, 9 East 298, 304, Lord Ellenborough says: \* “In contemplation of law, the word *damages* emphatically includes *costs*. It is so considered by Lord Coke,<sup>(a)</sup> and in the various authorities which have been cited. *Costs*, therefore, properly fall under the nomen generale of damages.” In *Levy v. Milne*, 12 J. B. Moore 418 (E. C. L. R. vol. 22), 4 Bingh. 195 (E. C. L. R. vol. 13), which was an action for a libel on a sheriff's officer, the jury asked whether 1s. would carry costs, and, being answered in the affirmative, they immediately returned a verdict for the defendant: and, though the Court granted a new trial on the ground that the verdict was perverse, it was never suggested that the learned Judge was wrong in telling the jury what the law was. Park, J., there says: “It appears that the jury returned their verdict after having inquired whether a shilling would carry costs: from this it is evident, that, had they been answered in the negative, they would have found for the plaintiff. The verdict was clearly perverse.” And Gaselee, J., says: “The verdict was not the result of a misconception on the part of the jury. They did not pursue a legitimate course. Their sole object was, to deprive the plaintiff of his costs.” [WILLIAMS, J.—Burrough, J., in that case, expressly says that the jury “had no right to take into their consideration the question of costs; they have only to deal out the damages.”] The plaintiff's right to costs following a verdict for a certain amount of damages, is a part of the law of the land, which every one is presumed to know. [WILLIAMS, J.—Which if the jury apply would lead them to a wrong conclusion.] The injury which the plaintiff has sustained through the wrongful act of the defendant, is, amongst other things, the necessary expense which she incurs in seeking redress. [KEATING, J.—Your

(a) Referring to *Pilford's Case*, 10 Co. Rep. 116 b.

theory would entirely defeat the intention of the legislature in the several statutes which have from \*time to time been passed to regulate costs.] There seems to be some diversity of opinion [\*773 amongst the Judges on this subject at the present day. In *Kilmore v. Abdoolah*, 27 Law J., Exch. 307, the jury having given a verdict for 5*l.* in an action for an assault and false imprisonment, expressly upon the supposition that it would carry costs, the Court of Exchequer refused to grant a new trial. Pollock, C. B., there says,—“There is no reason why the jury should not be informed, if they ask it, as it is a part of the law: but, if they do not ask it, and they have given their verdict, it cannot be disturbed merely because they did not know of it.” It is true, that Bramwell, B., in that case says that the jury had no right to give a verdict with reference to anything else than the injury sustained by the plaintiff. But there can be no valid objection to their being informed as to what the law is. In a very recent case, *Wakelin v. Morris*, 2 Fost. & Fin. 26, it being proposed to ask the plaintiff’s attorney, on cross-examination, in an action for slander, as to what would be the probable cost to the defendant if the verdict went against him even for nominal damages, the question was objected to as irrelevant. But Erle, C. J., admitted it, saying,—“I do not know on what ground I can exclude it.” And, at the close of the summing up, the jury having asked what sum would carry costs, his Lordship observed,—“I am not aware that there is anything to preclude my telling you: but the liability to costs depends upon various statutory enactments which it is not easy always to carry accurately in mind, and the answer might mislead you.” [WILLES, J.—The attorney was called for the purpose of proving his mercy to the defendant. The object of the learned counsel’s question was, to show that this apparent mercy was real cruelty.](a)

\**Huddleston*, Q. C., and *H. James* were not called upon to support the rule. [\*774

WILLIAMS, J.—I am of opinion that this rule should be made absolute. The verdict of the jury here professes to be founded upon something more than the view which they took of the amount of damages which the plaintiff had sustained from the injury she complained of: and the question is whether it is apparent, that, in assessing the damages in respect of that injury, the jury have acted contrary to their duty. I am of opinion that it does, and that the verdict ought not to be allowed to stand. Looking at the facts which appear upon the report of the learned Judge who tried the cause, I am clearly of opinion that the damages are excessive, and that it is impossible to come to any other conclusion than that the jury measured the damages they awarded to the plaintiff, not with reference to the injury which the plaintiff had sustained, but solely with reference to whether she should have her costs or not. There must therefore be a new trial.

WILLES, J.—I am of the same opinion. Whether the plaintiff was to have costs or not, was clearly a matter which was to be decided by the Court, and not by the jury. It is idle to say that to take the consideration of the costs from the jury is an usurpation on the part of the Court, because the very last statutory provision upon the subject,—

(a) In that case the plaintiff had a verdict for 1*l.*

the 34th section of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, expressly enacts, that "when the plaintiff in any action for an alleged wrong in any of the superior Courts recovers by the verdict of a jury less than 5*l*., he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed \*775] by default, in case the Judge or presiding officer \*before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought." The legislature there in express terms says that it is the Judge and not the jury who shall have the power of deciding whether or not the plaintiff shall have costs. Here, the jury were made to suppose that they were the proper persons to decide the question of costs,—a thing which it was wholly incompetent to them to do. It is most important that the province of the Judge and that of the jury should be kept distinct. I do not agree with Mr. *Powell* that every man is to be presumed to know the law. I admit that "*ignorantia juris non excusat*." (a) It would be absurd indeed to suppose that even the most experienced Judge knows the statute law upon all subjects, without looking into the books. (b) I think it would lead to a most inconvenient inequality in the administration of the law, if the question of costs were in any shape left to the consideration of the jury. I cannot entertain the slightest doubt upon the subject.

KEATING, J.—I am quite of the same opinion. To give effect to the argument of Mr. *Powell* would be to transfer to the jury that which the legislature has emphatically said shall be the province of the Judge. Rule absolute.

(a) 1 Co. Rep. 177. "*Ignorantia juris, quod quisque scire tenetur, nominem excusat*." 2 Co. Rep. 3 b.

(b) "*Ignorantia judicis est calamitas innocentis*." 2 Inst. 591.

\*776] \*HENMAN v. LESTER. June 27.

In an action charging the defendant with having made a fraudulent representation as to the price which certain seedsmen in London would give for certain seed, whereby the plaintiff was induced to sell it for a lower price than he otherwise would have done, the defendant, who appeared as a witness, having, in his examination in chief, denied the alleged misrepresentation, was asked on cross-examination whether there had not been proceedings against him in a county court, at the suit of one A., in respect of a similar claim, which he had resisted, and upon which he had given evidence, and the jury had notwithstanding found their verdict for the then plaintiff.

It was objected by the defendant's counsel that the questions relating to the contents of public judicial proceedings, which must be in writing, could not be asked, but that the record must be produced. The objection having been overruled, and the questions allowed to be put,—

Held, by Willes, J., and Keating, J. (dissentiente Byles, J.), that the ruling was correct.

THE first count of the declaration charged the defendant with having made a fraudulent representation as to the price which certain

seedsmen in London would give for a quantity of seed, whereby the plaintiff was induced to sell it at a much lower price than he otherwise would have done,—alleging special damage. The declaration also contained the common counts. Pleas, amongst others, not guilty, and set-off

The cause was tried before Pollock, C. B., at the last Spring Assizes at Bedford. The defendant having, in his examination in chief, denied that he had represented to the plaintiff that Messrs. Beck & Co., seedsmen in London, would give only a certain price for the seed in question, he was asked on cross-examination whether there had not been proceedings against him in the County Court at the suit of one Agutta in respect of a similar claim, which he had resisted, and upon which he had given evidence, and the jury notwithstanding found their verdict for the then plaintiff.

It was objected by the counsel for the defendant that the question could not be put, such evidence being inadmissible even for the purpose of testing the witness's credit, without producing or otherwise formally proving the record of the proceedings in the County Court.

The learned Chief Baron overruled the objection, and the defendant's answer was, that there had been \*such a suit, in which he had given evidence, and that he had lost the verdict. [\*777]

A verdict having been found for the plaintiff, damages 104*l.* 6*s.* 6*d.*,

*H. Mills*, Q. C., in Easter Term last, obtained a rule nisi for a new trial, "on the ground of the misreception of evidence, in permitting the defendant to be asked, and compelled to answer, the questions which were put to him as to his having had a cause in the County Court, and lost it, and as to the question in issue there." He referred to *Macdonnell v. Evans*, 11 C. B. 930 (E. C. L. R. vol. 73), *Whyman v. Garth*, 8 Exch. 803,† *Darby v. Ouseley*, 1 Hurlst. & N. 1,† and *The Wolverhampton New Waterworks Company v. Hawksford*, 5 C. B. N. S. 703 (E. C. L. R. vol. 94).

*O'Malley*, Q. C., and *A. K. Stevenson*, in Trinity Term, showed cause.—The objection at the trial was, that what occurred in the County Court could only be proved by the production of the record: [WILLES, J.—The Lord Chief Baron seems to have understood the objection to point to the relevancy of the inquiry, not to the mode of proof.] The object of the inquiry was, not to establish the proceedings in the County Court, but to prejudice the witness, by showing his dishonest course of dealing. This rule was granted mainly upon the authority of *Macdonnell v. Evans*, 11 C. B. 930 (E. C. L. R. vol. 73), where it was held that a witness cannot, upon cross-examination, even for the purpose of discrediting him, be asked as to the contents of a written paper which is neither produced nor its absence accounted for. The ratio decidendi in that case has no application here: there is no better evidence kept back. "The rule of evidence," says Jervis, C. J., "which governs this case, is applicable to all cases where witnesses are \*sworn to give evidence upon the trial of an issue. That rule is, that the best evidence in the possession or power of the party must be produced. What the best evidence is, must depend upon circumstances. Generally speaking, the original document is the best evidence: but circumstances may arise in which secondary evidence of the contents may be given. In the present case those

circumstances do not exist. For anything that appeared, the defendant's counsel may have had the letter in his hand when he put the question.<sup>(a)</sup> It was sought to give secondary evidence of the contents of a letter, without in any way accounting for its absence, or showing any attempt made to obtain it." And Maule, J., says: "This seems to me to be just the sort of case where it is sought to give secondary evidence of the contents of a document in the power of a party who does not choose to produce it." [BYLES, J.—That was the case which gave rise to the provision in the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 24. That, however, does not affect the question now before us.] In Russell on Crimes, Vol. II., p. 927, it is said,—“As to questions which are asked, upon cross-examination, for the purpose of throwing discredit on a witness, and which tend merely to disgrace and degrade him, without subjecting him to a penalty or criminal charge, the authorities are conflicting on the point whether he is compellable to answer them.” And at p. 931, the learned author says,—“The rule which requires the best evidence to be produced of which the nature of the thing is capable, is, it should seem, in some degree relaxed in regard to cross-examination for \*779] *the purpose of discrediting a witness; for, the rule is to be understood as applicable only to the proof of the issue, or some fact material to the issue.* Thus, it is usual in practice to ask, in cross-examination, an accomplice or other witness who appears against a person on a criminal prosecution, whether he has not been tried for some offence; although the fact of his having been tried for such an offence is partly matter of record, and therefore, according to the general rule, not to be proved without the record, which is the highest species of proof.” With regard to Darby v. Ouseley, 1 Hurlst. & N. 1,† the object was to prove the question in causâ. That was not the case here. The case of The Wolverhampton New Waterworks Company v. Hawksford, 5 C. B. N. S. 703 (E. C. L. R. vol. 94), is equally inapplicable. What possible objection can there be to a witness being asked whether he was plaintiff in an action and whether he lost the verdict?

*Mills, Q. C.*, in support of the rule.—The object of the inquiry was, to discredit the witness (the defendant) by the result of a trial between himself and a third party in the County Court. The impression of the Lord Chief Baron seems to have been, that, when once a witness is in the box, you have a right to get the contents of his mind. But it is clear that the 14 & 15 Vict. c. 99, s. 2, which renders the parties to a suit competent and compellable to give evidence, has not altered the rules of evidence: *Whyman v. Garth*, 8 Exch. 803.† The learned Judge says, in *Farrow v. Blomfield*, 1 Fost. & F. 653,—“If a question arises as to the contents of a written instrument, and you can get a witness to come and swear that he heard the plaintiff say that it contained such and such expressions, that is good evidence of the contents of the document, without producing it. And if the \*780] *\*plaintiff is himself in the box, you may ask him as to the contents of the document, and his answer will be as good evidence as*

(a) The witness was asked upon cross-examination,—a letter in his own handwriting being shown to him,—“Did you not write that letter in answer to a letter charging you with forgery?”

any previous statement. He may, perhaps, refer to the deed for better information, and perhaps the Judge might say that the document ought to be produced. I should do so myself in some cases." There is much contrariety of opinion in the cases and in the text-books on this subject,—see 1 Phillpotts on Evidence, 10th edit. 434, Vol. 2, 495, 1 Starkie on Evidence 198, 2 Taylor on Evidence, § 1317. The way in which the passage cited from Russell on Crimes got into Mr. Phillpotts's book, is explained by Williams, J., in his judgment in *Macdonnell v. Evans*, 11 C. B. 945 (E. C. L. R. vol. 73). There must be a limit to irrelevant inquiry. The 14 & 15 Vict. c. 99, does not alter the rule which requires the best evidence. The question is, whether questions having a tendency to disparage a witness may be put so as to get indirectly at that which will appear by the record in a civil action. The case of a conviction is provided for by the 25th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

*Cur. adv. vult.*

WILLES, J.—This case was argued before my Brothers Byles and Keating and myself: and I regret to say that the Court are not agreed. In his absence, I proceed to deliver the opinion of

BYLES, J.—In this case the plaintiff's counsel proposed to ask the defendant, when a witness under cross-examination, whether he had not brought an action in the County Court, what was the subject of the action, and what the result. The defendant's counsel objected that these questions, relating to the contents of public judicial proceedings, which must by law be \*in writing, could not be asked, and that the witness was not bound to answer them. The [781 learned Judge overruled the objection, and held that the questions were admissible, and further held (as I understood from the learned counsel) that the questions must be answered. But we are informed by the learned Judge that there was no express ruling that the witness was bound to answer.

I am of opinion that the objection of the defendant's counsel was well founded.

The question is a very important one; for, it affects the law of evidence, and therefore the daily judicial proceedings of every kind. It affects one of the principal rules of evidence, that a written document, if in existence, shall be produced, to the end that the Court may know correctly and certainly what it is, and may see the whole of it.

Before approaching the subject, it may be observed that it can make no difference that the witness was a party to the suit. The doctrine laid down in *Slatterie v. Pooley*, 6 M. & W. 664,† that a parol admission of a written document is not only *admissible*, but may be *sufficient* to prove it, cannot comprehend parol admissions of the contents of written documents extorted from parties under the pressure of cross-examination. The rule in *Slatterie v. Pooley* was contrary to the opinion of Lord Tenterden, often expressed: and though the practice thereby introduced is sometimes highly convenient, yet it ought not to be extended. In *Lawless v. Queale*, 8 Irish Law Reports 386, cited by Mr. Taylor in his book on Evidence 373, Chief Justice Pennefather, who was well qualified by his character, position, and great experience, to judge how the rule might operate, as well on

juries as on witnesses, in his own country, thus speaks of the case of  
 \*782] *Slatterie v. Pooley*:—"The doctrine laid down \*there is a most dangerous proposition. By it a man might be deprived of an estate of 10,000*l.* a year, derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they had heard the defendant say he had conveyed his interest therein by deed, or had mortgaged or had otherwise encumbered it: and thus by the facility so given the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty." The defendant, therefore, must be considered as standing in the position of an ordinary witness whom it is sought to cross-examine as to the contents of a written instrument.

On examination in chief and re-examination, the rule is plain, that a witness cannot be examined as to the contents of an existing written document. The document must be produced, and must speak for itself. Why is a different rule to prevail on cross-examination? I think the authorities conclusively show that the rule on cross-examination is exactly the same.

The leading authority is *The Queen's Case*, 2 B. & B. 288, 292 (E. C. L. R. vol. 6), where it was held by the Judges, and laid down by the House of Lords, that a witness cannot be asked *on cross-examination* as to the contents of a written document, without first producing it. Lord Tenterden, delivering the opinion of the Judges, says: "It is a rule of evidence as old as any part of the law of England, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence."

The whole subject was elaborately discussed in this Court in the case of *Macdonnell v. Evans*, 11 C. B. 630 (E. C. L. R. vol. 73), 21 Law J., C. P. 141, before four Judges,—Jervis, C. J., Maule, J., Cresswell, J., and Williams, J.,—all eminently qualified by learning and \*783] experience to decide the \*question: and there it was held (as, indeed, had been decided in the House of Lords), that, whether the document inquired about was material to the issue or only affected the credit of the witness, the rule was precisely the same. Williams, J., at first entertained a different opinion; but at last he says distinctly that *he concurs with the rest of the Court*. The same rule is recognised in *Wyman v. Garth*, 22 Law J., Q. B. 316, and in *Darley v. Ouseley*, 1 Hurlst. & N. 1.† In the text-books, for example, in *Phillipps on Evidence*, 9th edit., Vol. I., p. 292, it is laid down that oral evidence cannot be substituted for written evidence, *though it go only to the credit of the witness*.

Against these high authorities, no authority has been produced, except a passage from *Russell on Crimes*, which passage, so far as it states a relaxation in practice, is no doubt correct, but, as to the strict law, it cannot, I conceive, weigh against the decision of the House of Lords and the other cases above referred to.

The rule in Westminster Hall, and certainly in this Court (to the practice of which I can speak from daily personal knowledge for twenty years), has hitherto been, that the contents or effect of a written document cannot, except by consent, be proved otherwise than by production of the document itself; and that the rule is

universal and inflexible, whether the inquiry arose on examination in chief, on cross-examination to the facts of the case or to the credit of the witness, or, lastly, on re-examination. Indeed, so strictly has the rule sometimes been observed here, that the late Lord Chief Justice Wilde would not suffer it to be infringed, even with the consent of counsel.

It is quite true, that questions on cross-examination as to written documents or former judicial proceedings, civil or criminal, are very often asked and answered \*without objection. The opposing counsel fears the effect of an objection; and the Judge does not [\*784 see fit to interfere. It is also true that the ingenuity of counsel would often make a successful objection fruitless and injurious. But still the power of objecting to an inquiry into the contents of written documents not produced remains, both with the opposing counsel and with the Judge.

I conceive that this state of the law is convenient in the highest degree. On the one hand, the light is not necessarily excluded, though the written document be not in Court: on the other hand, the presiding judicial officer retains his control over the evidence, and can at any time prevent the discussion losing itself in documents immaterial to the true issue, and not before the Court. If the Judge had not this power, counsel on cross-examination and re-examination would have a strict right to inquire, for example, into the contents of a long and voluminous correspondence not produced and immaterial to the merits of the case, though *alleged* to affect the credit of a witness; the Judge being unable to tell whether it had even that effect, till the uncertain parol evidence was all before him on both sides. But, if the Judge should refuse to allow this conjectural, uncertain, and interminable inquiry to proceed, his ruling might be subject to a bill of exceptions.

It is objected, that, if the writing excludes parol evidence, no evidence at all can be given. I think that is not so, but that, where the inquiry is as to an act or default of the witness tending to discredit him, and the law excludes his parol testimony because there is a writing, the law is not so absurd as first to require better evidence, and then to refuse it. The Queen's Case shows that such evidence may be given in the instance of a letter tending to discredit the \*witness. And, in the case of a verdict and judgment, either [\*785 in a criminal or a civil suit, if the record be made up and produced, I should think it may be read, and the witness may at least be asked whether he is the person to whom that record relates.

It makes no difference that the learned Judge in the present case did not tell the witness that he must answer the question. The authorities show that the *question cannot be put*. And, as the witness was party to the cause, his objection to the question by the mouth of his own counsel sufficiently shows that he objected to answer.

Nor is it in my opinion an objection to this rule, that the evidence admitted probably had no influence on the verdict. If that were a reason for refusing a new trial, either bills of exceptions would be introduced in a multitude of cases where the parties are now content with a motion for a new trial, or the law of evidence, on which all rights depend, might by degrees be relaxed to a dangerous extent.

If it be objected that the admission on cross-examination of docu-

ments going merely to the credit of the witness violates the rule that the evidence in the cause must be pertinent to the issue, the answer is, that the same objection applies equally to parol evidence elicited on cross-examination, going merely to credit. Cross-examination to discredit a witness, is necessarily in most cases an exception to the rule that evidence must be pertinent to the issue: but, why should it be an exception to another rule also, that written documents must be produced if their purport or contents are to be proved? In truth, the requisition of written documents used in cross-examination going to credit only, is but a mode of conducting that cross-examination. They are not admissible to contradict a witness, though they may sometimes have that effect. \*They are to be put in first; they \*786] are to precede the question, and are part of the evidence given by the witness.

I forbear to observe on the enactments of the second Common Law Procedure Act, because they do not touch this precise question; or on the rule as to examination on the *voire dire*, for, that is *extra causam*, and for the Judge only.

Lastly, it may be added that the protection of the witness requires the power of calling for the writing as to which he is examined; for, no peril can be more alarming than that of swearing to documents which the witness may have written years ago, or which perhaps he never saw. I will not enlarge on the temptation thus held out, not only to counsel, but to practitioners in inferior Courts throughout the kingdom, to abuse the power of cross-examination.

It is with great regret and diffidence that I venture to dissent from the opinion of the other members of the Court. But I am bound to express the strong opinion I entertain that this rule should be made absolute.

WILLES, J.—I now proceed to deliver the judgment of my Brother Keating and myself; and I regret to say that we feel bound, with all deference, to dissent from the opinion of my Brother Byles, and also from the dictum of Cresswell, J., in *Maconnell v. Evans*, 11 C. B. 930 (E. C. L. R. vol. 73).

In this case, a new trial is demanded by the defendant because of an alleged misreception of evidence.

The defendant, upon his cross-examination, was asked whether there had not been proceedings in an action against him in the County Court in respect of a similar claim, which he had resisted, and upon which he had given evidence, and the jury notwithstanding \*787] \*had found their verdict for the then plaintiff. His answer was in the affirmative, that there had been such a suit, in which he had given evidence, and had lost the verdict.

It was hardly disputed that the inquiry was admissible, as going to the credit of the witness; and it is not denied that in point of fact such proceedings did take place in the County Court; but Mr. *Mills*, for the defendant, insisted that such evidence was inadmissible even for the collateral purpose of testing the witness's credit, without producing, or otherwise formally proving, the record of the proceedings in the County Court, and that the defendant was entitled, as a matter of right, to a new trial, by reason of its reception.

The learned counsel were not agreed as to the precise point ruled by

the Lord Chief Baron at the trial. I have, therefore, thought it necessary to speak to the learned Judge, who informs me that he only allowed the question to be put, because, the defendant being a party to the cause, his answer, if he thought proper to give one, would be evidence, whether it related to a writing or not, and that the learned Judge did not compel the defendant to give an answer to the question, and indeed gave him the option of answering or not; for, he stated that it was for the witness to give or withhold an answer, as he thought proper; and that, if and when he refused, it would then be time enough to decide whether he *must* answer. The learned Judge adds that he does not see how, when the opposite party was in the witness-box, he could with propriety have overruled the question, an answer to which, if given, would unquestionably be evidence; and that, as the witness chose to answer the question, he was not called upon to rule, and did not rule, that the witness could be compelled to do so.

It appears, therefore, that the learned Judge was \*misapprehended by the defendant's counsel when the latter supposed [\*788 that the Judge intended to rule, that, because a statement of a party as to the contents of a written document is evidence against him without producing the document, therefore that such party when called as a witness in his own cause must answer as to the contents of any written document as to which he may be asked, and has no right to refuse to answer, and so insist upon the production of the written document. This was not ruled by the learned Judge, nor argued by the counsel for the plaintiff; nor is it sanctioned by any member of the Court.

We cannot say that the learned Judge was wrong in going the length he did, viz. allowing the *question* to be put, even supposing that it could not have been put to a witness who was a third person, without proving the record.

This explanation of the learned Judge appears to us abundant to dispose of the rule; but, as my Brother Byles is of a contrary opinion, it becomes necessary to add, that, in our opinion, even if the witness had been a third person, no new trial ought to be granted by reason of this question being allowed. We dissent, with due deference, from the opinion of my Brother Byles and the obiter dictum of Craswell, J., in *Macdonnell v. Evans*, 11 C. B. 935 (E. C. L. R. vol. 73), as to what stands upon the same ground, viz. the necessity of producing the record of a conviction, in order to found the question, on cross-examination, "Have you not been convicted?" Upon a question collateral to the issue, as a rule, the questioner is bound by the answer; so that extraneous evidence is vain. Either the witness answers "I have been convicted," and the question is useless, or he denies it, and then (apart from the second Common Law Procedure Act, 1854, s. 25, which does not touch this case) the proof of the conviction is forbidden. It \*cannot be given in evidence before the witness has answered, [\*789 for it is not evidence in the cause. It could not be given in evidence after, because the answer is conclusive; and so of the proceedings in the County Court in the present case. The case of *Macdonnell v. Evans*, *The Queen's Case*, and numerous other cases in which it has been held that documents must be produced, are cases in which either the document would have been evidence upon the issue, or to contradict the witness if he answered in a particular way, or in which

the precise terms and language of the documents were necessary to be referred to in order to answer the question. This is not a question as to the contents of a written document.

Furthermore, we apprehend, that, even if the Judge had decided wrongly upon this collateral point, we ought not to grant a new trial: the Judge's mistaken ruling as to matter collateral to the issue, not being ground for a bill of exceptions, never ought to be ground for a new trial, unless the Court can see that injustice has been occasioned by the mistake: see *Black v. Jones*, 6 Exch. 218.† And in this case we can plainly see not only that no injustice has been done, but that the objection is an unreal one, and that, if we sent down the case to a new trial, we should pronounce a decision equally far from the merits of the case as it is from truth and fact. Rule discharged.

*Slatterie v. Pooley*, if consistently carried out, certainly seems to rule the principal case, for where a party becomes a witness, his testimony is necessarily an admission. Mr. Justice Byles, impressed with the logical weight of that decision, commented upon its consequences, with a view, apparently, to its reconsideration.

*Macdonnell v. Evans* decided that there was no exception to the rule, which requires the best evidence even on cross-examination merely for the purpose of discrediting a witness. This decision called forth considerable animadversion: see second report of Common Law Commissioners, dated April 30th 1853, 73 E. C. L. R. 946, note.

In deference to professional opinion, the 25th section was inserted in the stat. 17 & 18 Vict. c. 125, which establishes the right to question a witness as to his previous conviction, and then to contradict his denial, if made, by proof of the record. The *obiter dictum* of Willes and Keating, JJ., that the record would not be necessary in order to lay the foundation for the question put in the principal case, though the witness had not been a party to the action, is met by the case of *Newcomb v. Griswold*, 10 Smith (N. Y. Court of Appeals, 1862) 298, which decides expressly that the question cannot be put, but that the record must be produced.

\*790]

\*CLOTHIER v. WEBSTER. May 30.

A public body, though acting gratuitously for the benefit of the public, is responsible for damage resulting from the negligent performance of the duty intrusted to it.

The 135th section of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, empowers the Board of Works to make a sewer, and to carry their works through or under any cellar or vault under the carriageway or pavement of any street, &c., making compensation for any damage done thereby; and by s. 225 a special mode of ascertaining the amount of damage sustained is pointed out:—

Held, that these provisions did not preclude one who had sustained damage from work done by a contractor under the orders of the board, from maintaining an action against the contractor, where the damage had arisen from his negligence and want of care and skill.

THIS was an action brought by the plaintiff, a baker carrying on business in the road leading from Greenwich to Woolwich, in the county of Kent, against the defendant, a contractor under the Metropolitan Board of Works, for an injury done to his oven through the negligent performance of the work, the alleged grievances being, the

not properly filling up an excavation under it, and the improperly working a steam-engine near it so as to cause the oven to sink and crack.

The cause was tried before Erle, C. J., at the last Spring Assizes at Maidstone. On the part of the plaintiff, evidence was given which satisfied the jury that the defendant had been guilty of negligence. The defence was, that the work was done under a contract by which the defendant was bound to follow the directions of the engineer of the Board, and that he was not liable to be sued,—the remedy for any injury done in the course of carrying out the contract being against the Board in the manner pointed out by the 225th section of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120.

The jury having assessed the damages at 20*l.* 12*s.*

*M. Chambers*, Q. C., in Easter Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendant, on the ground that the acts complained of were committed by the authority of the Metropolitan Board of Works under the statute, and were the subject of compensation, and not of an action.

\**J. Rees* now showed cause.—The circumstance of the work having been done by the defendant under a contract with the Board of Works, affords no justification for negligence: *Brine v. The Great Western Railway Company*, 31 Law J., Q. B. 101. If this had been the case of damage necessarily done in the carrying out of the lawful orders of the board or their officers, the 135th and 225th sections of the Metropolis Local Management Act would have been applicable. But the board are not responsible for the contractor's negligence. [WILLES, J.—See *Gayford*, app., *Nicholls*, resp., 9 Exch. 702.†] In *Ellis v. The Sheffield Gas Consumers' Company*, 2 Ellis & B. 767 (E. C. L. R. vol. 75), it was held, that, though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong. But there the act which the contractors were employed to do was in itself unlawful. [ERLE, C. J.—It is clear from the evidence that the engineer and surveyors of the board were the parties giving the directions for the doing of the work.] Assuming that to be so, that affords no answer to a complaint against the contractor for doing the work negligently. [WILLIAMS, J.—The jury have found that the damage was occasioned by the defendant's want of care and skill. The question is, whether the Metropolis Local Management Act contemplates anything but damage which would have accrued had the work been done with the utmost possible care and skill.] That is precisely what, it is submitted, the statute does not contemplate.

*M. Chambers*, Q. C., *J. Brown*, and *Oraufurd*, in support of the rule.—Here is a public body authorized \*by Parliament, for [\*792 the performance of great public works, and for that purpose to carry such works "through, across, or under any turnpike road, or any street or place laid out as or intended for a street," or "through or under any cellar or vault under the carriageway or pavement of any street, or into, through, or under any lands whatsoever," s. 135;

"making compensation for any damage done thereby, as hereinafter provided." To avoid a multiplicity of petty actions, the 225th section enacts, that, "in every case where the amount of any damage, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner, or the amount of any damage, costs, or expenses is by this Act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount shall, in case of dispute, be ascertained and determined by and shall be recovered before two justices; and the amount of any compensation to be made under this Act by the metropolitan board or any vestry or district board, shall, unless herein otherwise provided, be settled, in case of dispute, by, and shall be recovered before, two justices, unless the amount of compensation claimed exceed 50*l.*, in which case the amount thereof shall be settled by arbitration, according to the provisions contained in the Lands Clauses Consolidation Act, 1845, which are applicable when questions of disputed compensation are authorized or required to be settled by arbitration." Here, the defendant was doing a lawful act, in a lawful manner. By the terms of his contract with the board, he is bound to follow the instructions of the engineer and surveyors appointed by the board: that puts him in the position of a common servant: and the case falls within the rule respondent superior. The alleged negligence consisted in an error in judgment on the \*part of the officers of \*793] the board. No doubt, where the act charged is a mere act of negligence on the part of the contractor, the contractor is liable. But, where the act is directly done in pursuance of the duty imposed upon him by the contract, the employer is equally liable with the contractor. The point was very much discussed in *Allen v. Hayward*, 7 Q. B. 960 (E. C. L. R. vol. 58). That case shows that the Metropolitan Board of Works are liable for all acts of the contractor strictly within the terms of the contract. If he has done no more than they or their engineer or surveyors ordered him to do, they, and not the contractor, are liable: and, when a party injured by the construction of the works may have compensation against the principals, it was not intended by the statute that there should be an alternative remedy against any other person. In *Hole v. The Sittingbourne and Sheerness Railway Company*, 6 Hurlst. & N. 488,† which was recognised and adopted by this Court in the recent case of *Pickard v. Smith*, 10 C. B. N. S. 470 (E. C. L. R. vol. 100), Wilde, B., says,—“The distinction appears to me to be, that, when work is being done under a contract, if an accident happens and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But, when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act, and is responsible for it.” [WILLIAMS, J.—In that class of cases the question was as to the liability of the principal. In *Pickard v. Smith*, we did not think it necessary to go so far as *Hole v. The Sittingbourne and Sheerness Railway Company*. WILLES, J.—The maxim re-

spondeat superior does not apply to wrongs, except \*mere acts of omission. For instance, for the negligent loss of a parcel by a coachman, the proprietor is liable; but, for a wrongful conversion of it, both would be responsible.] In *Brownlow v. The Metropolitan Board of Works, Williams, J.*, at the trial, said,—2 *Fost. & F.* 610,—“As regards the point that the board are not liable because the work was done by a contractor, as it is now not disputed that the piles were driven in according to the working drawings and the contract, it makes no difference whether the work was done by Aird as contractor, or as the servant of the board, *because the exact thing they ordered was done.* And the only ground upon which Aird, the contractor, could be liable, as distinguished from the board, would be, in not having placed some barge or buoy to mark where the piles were.” So, here, the negligence, if any, was that of the officers of the board, for which they are responsible, on the principle stated by *Cresswell, J.*, in *Steel v. The South Eastern Railway Company*, 16 *C. B.* 550 (*E. C. L. R.* vol. 81). In *Ward v. Lee*, 7 *Ellis & B.* 426 (*E. C. L. R.* vol. 90), the defendants, being contractors acting under the authority of the Metropolitan Commissioners of Sewers, and *bonâ fide* acting for the purpose of executing the statute 11 & 12 *Vict. c.* 112, *by negligence* injured the plaintiff's premises; and it was held that they were exempted from all liability by the 128th section of the statute, which enacted “that no matter or thing done or contract entered into by the Commissioners, or by any clerk, surveyor, or other officer or person whomsoever acting under the direction of the Commissioners, should, if the matter or thing were done or the contract were entered into *bonâ fide* for the purpose of executing that act, subject them or any of them personally to any action, liability, claim, or demand whatsoever.” The judgment of *Gibbs, C. J.*, in *Sutton v. Clarke*, 6 *Taunt.* 34 (*E. C. L. R.* vol. 1), 1 *Marsh.* 429 (*E. C. L. R.* vol. 4), is very much \*to the purpose, and shows how slow the Courts are to impose [\*795 personal liability upon persons who act gratuitously for the benefit of the public. [*ERLE, C. J.*—I doubt very much whether the absolute exemption of public bodies from liability where their work is done negligently would be very cordially assented to. *WILLES, J.*—*Sutton v. Clark* and all that class of cases were very much considered in this Court in the recent case of *Whitehouse v. Fellowes*, 10 *C. B. N. S.* 765 (*E. C. L. R.* vol. 100).(*a*)]

*ERLE, C. J.*—I am of opinion that this rule should be discharged. The action was brought against the defendant for negligence in the construction of a sewer, by reason of which the premises of the plaintiff were injured: and the jury found that there was negligence and want of skill and care on the part of the defendant in doing the work, and

(a) And see *Holliday v. The Vestry of St. Leonard, Shoreditch*, 11 *C. B. N. S.* 192 (*E. C. L. R.* vol. 103).

In *Arthy v. Coleman*, 30 *Law Times* 101, a contractor employed by a local board of health to do a particular act, was held to be liable for the consequences of doing the act in a negligent manner, and not to be protected by the Health of Towns Act, 11 & 12 *Vict. c.* 63. “The maxim *respondent superior*,” said Lord Campbell, “does not absolve the inferior, if by his negligence a loss has been sustained. Where there is no negligence in the party who acts in obedience to the instructions of the board of health, he is not liable; but if in doing the act he is guilty of negligence, whereby loss and damage are occasioned to another, he is personally liable.”

that the damage complained of was caused thereby. A rule has been obtained to enter a verdict for the defendant, on the ground that the acts complained of were committed by the authority of the Metropolitan Board of Works under the statute 18 & 19 Vict. c. 120, and were the subject of compensation, and not of action. I am clearly of opinion that these works are made lawful by the 135th section of \*796] the statute, which gives the Board of Works full power to carry their works "through, across, or under any turnpike-road," &c., or "through or under any cellar or vault under the carriage-way or pavement of any street, or into, through, or under any lands whatsoever," making compensation for any damage done thereby. The carrying the sewer under the plaintiff's oven, as was done here, was therefore a lawful act. But the law requires that the execution of public works by a public body shall be conducted with a reasonable degree of care and skill; and, if they or those who are employed by them are guilty of negligence in the performance of the works intrusted to them, they are responsible to the party injured. *Lawrence v. The Great Northern Railway Company*, 16 Q. B. 643 (E. C. L. R. vol. 71), is a case of that class. There, a railway, constructed in conformity with its Act of Parliament, was carried along an embankment upon low lands lying between a river and the plaintiff's land. The low lands were separated from the plaintiff's land by a bank, which, before the railway embankment was placed there, sufficed to protect his land from the flood-waters of the river; but, in consequence of the railway embankment, the flood-waters were unable to spread themselves over the low lands, as formerly, and flowed over the bank into his land. And it was held, that, although the Company were not required by their Act to make flood-openings to their embankment, and would not be compellable by mandamus to make them, yet, as they might, by proper caution, have prevented the injury sustained by the plaintiff, an action on the case was maintainable against them for such injury; and that compensation for damage arising to the plaintiff under such circumstances was not included in the compensation awarded by an arbitrator to whom it had been referred to ascertain the sum to \*797] be paid by the Company for the purchase of part of the adjoining land and as compensation for all injury and damage to the remainder "by severance or otherwise,"—such compensation relating only to damage known or contingent by reason of the construction of the railway on the land purchased, and to such other damage arising from the construction of the railway at other places as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded. The same principle is recognised in the case of *Brine v. The Great Western Railway Company*, 31 Law J., Q. B. 101, where an action was held to be maintainable for damage resulting to the plaintiff from the negligent construction of works which the defendants were empowered by an Act of Parliament to construct. It is upon that ground that we think the present action maintainable. We quite agree that no action will lie in respect of injury sustained which is made the subject of compensation under the Act. The legislature always contemplates that the construction of works which it renders lawful shall be conducted with due care and skill. My judgment proceeds upon this ground, that,

if the Metropolitan Board of Works or those they employ are guilty of negligence in the performance of the work intrusted to them, the party injured thereby may seek his remedy by action, and is not bound to have recourse to the mode pointed out by s. 225 to obtain compensation.

WILLIAMS, J.—I am entirely of the same opinion. We must deal with the matter presented to us upon this rule as if the Metropolitan Board of Works had been the defendants. The question is whether the effect of the 135th and 225th sections of the Metropolis Local Management Act preclude the plaintiff from having recourse to his common law remedy for \*the injury he has sustained, and [\*798 confines him to the mode of obtaining compensation provided by s. 225. I quite agree that the last-mentioned section does not give a cumulative remedy, but that it is the sole and exclusive remedy in all cases to which it is applicable. But I am clearly of opinion that it does not apply to damage which is the result of negligence and want of skill on the part of the Board or of those whom they employ, but only to damage which must have been caused by the carrying out of the works however carefully and skilfully those works had been done. The jury here have found that the damage in respect of which their verdict has been given would not have occurred if the works had been conducted with ordinary care and skill. For damage which is the result of negligence and want of skill, the defendant is clearly responsible.

WILLES, J.—I am of the same opinion. Looking at the ground stated in the rule, the only question for us to consider, is, whether, assuming that the Metropolitan Board of Works carry on the works intrusted to them in a negligent and unskilful manner, and damage thereby results to an individual, they are not liable to an action. The distinction between the Board and the contractor is not a substantial one. The only point for consideration, is, whether, in such a case as this, when the jury have found that the injury complained of resulted from want of reasonable care and skill in the construction of the work, the Board are liable to make compensation to the party injured, or whether his remedy is confined to that pointed out by the 225th section of the 18 & 19 Vict. c. 120. For the reasons and upon the authorities mentioned by the rest of the Court, I am clearly of opinion that this action may be maintained. Rule discharged.

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\*LAWRENCE v. WALMSLEY. *June 27.* [\*799

To a declaration upon a joint and several promissory note given to the plaintiff by the defendant and one J. E., payable on demand, the defendant pleaded, for defence on equitable grounds, that he made the note jointly with J. E. for the accommodation of the said J. E., and as his surety only, to secure payment of a loan made by the plaintiff to J. E., and that, before and at the time when the note was made, the plaintiff, having notice of the premises, agreed with the defendant, in consideration of his making the note as such surety as aforesaid, that the plaintiff would call in and demand payment of the note from J. E. within three years from the date thereof; that the plaintiff, at the time of making the note, with intent to carry out the agreement, and with the assent of the defendant and J. E., wrote on the back of the note as follows,—“Memorandum: this note is to be paid off within three years from date;” that the

memorandum was signed by J. E., but that, by mistake of all the parties, it was omitted to be mentioned in the memorandum that the plaintiff was to call in and demand payment of the note from J. E. within the three years; and that the plaintiff neglected to demand or call in payment of the note within the period aforesaid, whereby he lost the means of obtaining payment from J. E., who had since become and was insolvent:—Held, that this plea disclosed a good equitable defence to the plaintiff's demand against the defendant.

To an action by the payee against one of two makers of a promissory note, the defendant pleaded that he made the note jointly with one E., for the accommodation of E., and as his surety only, to secure payment of a loan of 200*l.* then made by the plaintiff to E., and that, at the time of the note being made and signed by the defendant and E., a memorandum was by agreement between the plaintiff, E., and the defendant, endorsed upon the note, and signed by E., in the following words, "Memorandum: This note is to be paid off within three years from date: J. E.," and that the plaintiff did not compel payment of the note within the period of three years, which elapsed before the commencement of the suit: Held, on motion for judgment *non obstante veredicto*, that this plea afforded no defence.

THE first count of the declaration stated that the defendant, on the 29th of January, 1858, by his promissory note now overdue, promised to pay to the plaintiff or his order, on demand, 200*l.*, with interest thereon at 6 per cent. per annum, but did not pay the same.

There were also counts for money lent, money paid, interest, and money found due upon accounts stated.

The defendant pleaded to the first count,—first, that he did not make the said promissory note, as alleged,—secondly, for a defence on equitable grounds, that he made the said note jointly with John Evison, for the accommodation of the said John Evison, and as his surety only, to secure payment of a loan of 200*l.* then made by the plaintiff to the said John Evison solely, with interest thereon; and that, before and at the time when the said note was made, *the plaintiff, having notice of the premises, agreed with the defendant, in consideration of his making the said note as such surety as aforesaid, that the plaintiff would call in and demand payment of the said note from the said John Evison within three years from the date thereof*, and that such agreement should be then endorsed in writing upon the said note, and thereupon, at the \*800] time of making the said note, the plaintiff, with intent \*to carry out the said agreement, and with the assent of the defendant and the said John Evison, wrote upon the back of the said note the words following, that is to say,—“Memorandum: this note is to be paid off within three years from date;” which memorandum was then signed by the said John Evison; but, by mistake of all the said parties to the said note, it was omitted to be mentioned in the said memorandum that the plaintiff was to call in and demand payment of the said note from the said John Evison within the three years aforesaid, pursuant to the said agreement; and that the plaintiff wholly neglected and omitted to demand or call in payment of the said note within the period aforesaid, whereby he lost the means of obtaining payment from the said John Evison, who had since become and was insolvent.

There was also a plea of never indebted to the common counts.

The plaintiff took and joined issue on the several pleas.

He also demurred to the second plea, the ground of demurrer stated in the margin being, “that the alleged mistake (if any) is not such as affects the plaintiff's remedy on the note, and is not such as a Court of equity would correct, for, it is not clear and evident what was meant by calling in and demanding payment of the note, and a mere

demand might and probably would have been perfectly nugatory and a mere idle ceremony, and of no possible benefit to the defendant." Joinder.

*Kemplay*, in support of the demurrer.(a)—The facts \*disclosed by the plea possibly may constitute a binding agreement, but [\*801 they do not control the express contract apparent on the face of the note. This is not a case in which a Court of equity would grant a perpetual injunction. It is not the case of a note signed by the defendant as surety, and time given to the principal debtor without the surety's consent, as in *Pooley v. Harradine*, 7 Ellis & B. 431 (E. C. L. R. vol. 90), where it was held, that, though the absolute written contract between the defendant and the plaintiff contained in the note could not be varied by parol in equity any more than at law, yet an equity arose from the \*relation of surety and principal between [\*802 the defendant and the third party, and the notice thereof to the plaintiff at the time he took the note, and therefore that the plea was a good plea on equitable grounds. The defence does not depend upon any agreement, but upon this, that, the surety being prejudiced by time given to the principal, an equity arises, which in a Court of equity entitles the surety to relief: *Greenough v. M'Clelland*, 30 Law J., Q. B. 15. [WILLIAMS, J.—The principle is the same here as in equity. The equity is, that the position of the surety shall not be altered or deteriorated by any dealings with the principal debtor.] Not upon the assumption of any agreement, but upon the fact of the defendant's being surety, and that the plaintiff was aware of it when he consented to give time to the principal. [WILLIAMS, J., referred to *Watts v. Shuttleworth*, 5 Hurlst. & N. 235.† There, by articles of agreement H. agreed with W. (the plaintiff) to complete certain fittings for a warehouse for 3450*l.*, to be paid by instalments during the work. The contract contained a stipulation "that W. (the plaintiff) shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract." By agree-

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the alleged mistake (if any) is not such as affects the plaintiff's remedy on the note, and is not such as a Court of equity would reform, for, it is not sufficiently clear or evident what was meant by calling in and demanding payment of the note, and a mere demand might and probably would have been perfectly nugatory and a mere idle ceremony, and of no possible benefit to the defendant:

"2. That the agreement set up by the second plea is altogether uncertain and indefinite, for, it does not appear what is the meaning of calling in and demanding payment of the note from Evison, or what proceedings (if any) the plaintiff was bound to take against Evison before suing the defendant on the note:

"3. That it is not alleged, nor is it to be inferred, that the defendant was to be released and discharged from payment of the note if the plaintiff did not within three years call in and demand payment from Evison of the said note (whatever that may mean), nor does it appear that such calling in or demand was intended to be or was a condition precedent to the defendant's liability upon the note:

"4. That, at the most, the alleged agreement was and is a collateral agreement only, for the breach of which the defendant may in an action upon such agreement recover according to the measure of the damage (if any) sustained by the defendant by reason of the plaintiff's neglect in not calling in or demanding payment of the note from Evison within three years:

"5. That, if what is alleged to have been omitted by mistake had been inserted, it would not have furnished any defence to the defendant either at law or in equity."

ment, reciting in part the contract, the defendant agreed with the plaintiff to guaranty the due performance of the works by H. The agreement was to be signed, and was in fact signed, at the office of the architects, and the defendant stated that a clerk of the architects told him that he incurred no risk in consequence of the stipulation as to the insurance, and that therefore he signed the guarantee. The plaintiffs advanced 1800*l.* to H. during the progress of the work, after \*803] which the fittings (to the \*value of 2300*l.*), while still unfinished, were destroyed by an accidental fire in the workshop of H. The plaintiff had not insured the fittings. H. became insolvent, and never repaid the 1800*l.* or any part of it. The plaintiff was compelled to pay a sum greater by 340*l.* than the original contract price to another person, to complete the work contracted for. It was held, that the plaintiff ought to have insured the fittings, and having omitted to do that which his duty towards the defendant required him to do, and which if he had done the defendant would have been relieved to the extent of the insurance, the defendant was discharged.] There, the defendant only agreed to become surety, provided the plaintiff would insure the fittings. Here, it does not appear that the defendant has sustained any prejudice from the plaintiff's not suing Evison at the end of the three years: it does not follow that Evison would have paid the note then if called upon. [ERLE, C. J.—That might be said in every case of suretyship.] There was no binding contract to give time to the principal here.

\*804] *J. Brown, contra.*(a)—The memorandum endorsed on \*the note is, it may be conceded, a collateral agreement: but it is difficult to conceive that a mere notice of suretyship can have more effect than an express collateral engagement like this. If the creditor is not bound by it, the consequence will be that the liability of the surety will extend over six years. In *Watson v. Alcock*, 22 Law J., Ch. 858, upon the taking of a guarantee for the repayment of advances to a customer, a bank took from the customer a warrant of attorney to secure the debt, and entered into an agreement with the surety that the bank would, at any time when requested by the surety, enter up judgment and levy execution against the customer, the principal debtor, on the warrant of attorney. The surety made a request to that effect, and the bank took the goods of the customer in execution to an amount sufficient to satisfy the debt. On the bankruptcy of the customer, the assignees brought an action against the bank for the goods, and they succeeded,—the bank having neglected to comply

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the agreement shown in the plea entitled the defendant to a presentment of the note and demand of payment from the principal debtor, in order to charge the defendant, which was not done:

"2. That the plea shows that the plaintiff lost the means of obtaining the money from the principal debtor, by not acting up to the agreement, and thereby discharged the defendant as the surety:

"3. That the above fact, coupled with the mistake in endorsing the agreement on the note, would be a complete defence in equity, and is a good equitable plea:

"4. That the mistake in the endorsement on the note would not exclude parol evidence of the true agreement:

"5. That, if the endorsement is not capable of correction or explanation by parol evidence, then the note is in effect payable in three years, and not on demand, and the first count is thus negatived."

with the requirements of the Bankrupt Law Consolidation Act, by not filing the original warrant of attorney or a true copy in proper time, it was held by the Lords Justices (affirming a decision of Vice-Chancellor Stuart) that the neglect of the bank operated as a discharge of the liability of the surety. It is extremely difficult to distinguish that case from the present. Lord Justice Turner, in giving judgment, says: "There is a distinct undertaking by the bank contained in the memorandum of the 19th of March, 1854, by which they agree, upon the requisition of the father, that they will immediately levy execution against the son in respect of the 1800*l.* \*secured by the warrant of attorney. Undoubtedly, if that undertaking was founded on a good consideration, it placed the bank in this situation,—that they are bound to put in execution the warrant of attorney upon the application of the father. The obligation of doing so is upon the bank, and they could only be in a position to do so by filing the warrant of attorney within the twenty-one days, as required by the statute 12 & 13 Vict. c. 106, s. 136. That they have neglected to do, and the consequence is, that the security is ineffectual, and the bank are placed in such a position that the agreement they have entered into with the plaintiff cannot be carried into effect, and the security given to them by warrant of attorney has been lost." [WILLIAMS, J.—Lord Justice Knight Bruce says: "The agreement which was entered into in March, 1861, and the warrant of attorney of the same date, form essentially one transaction."] So, here, the promissory note and the collateral agreement may be said to be all one transaction. Why should the surety be put to a cross-action? [ERLE, C. J.—Mr. *Kemplay* would say that the amount due on the note is certain, but the amount of damnification sustained by the neglect of the creditor to enforce it is contingent and uncertain.] It may be that the principal debtor was equally insolvent at the beginning as at the end of the three years. But the law does not regard that: the surety has a right to say *Non hæc in foedera veni*. The substantial question is, whether the position of the surety has been altered by the act of the creditor. In *Pooley v. Harradine*, 7 Ellis & B. 431 (E. C. L. R. vol. 90), there was no express collateral contract. Coleridge, J., in delivering the judgment of the Court, there says: "At law, it seems to have been thought that the discharge of the surety by such giving time to the principal was founded on a variation of the contract between the \*creditor and the surety: and, if that be so, it necessarily follows (the rule of evidence as to not varying a written contract by parol being the same at law and in equity) that no parol contemporaneous agreement could be allowed to vary the contract in the case of a written instrument. Probably the cases at law would be too strong to make it proper for us, not sitting in a Court of error, to decide contrary to the current of authorities on this subject, were we disposed so to do, if the case now before us were that of a legal plea. It is important, however, for the decision of this case, to consider whether, in equity, the doctrine of the discharge of the surety by time given to the principal debtor is confined to cases where the relation of suretyship appears on the original contract between the creditor, the principal, and the alleged surety, or whether an equity does not arise from the relation of the co-obligors or co-promissors inter se, and on the know-

ledge by the creditor of the existence of that relation." And, after adverting to the cases of *Hollier v. Eyre*, 9 Clark & F. 45, *Strong v. Foster*, 17 C. B. 201 (E. C. L. R. vol. 84), and *Davies v. Stainbank*, 6 De Gex, M'N. & G. 679, the Court come to the conclusion that the latter is the true principle. In *Watts v. Shuttleworth*, 5 Hurlst. & N. 285,† it appeared on the record that the non-performance on the part of the plaintiff of the duty to insure created the incapacity of the principal to perform his engagement, and so the surety was discharged. This is an *a fortiori* case: the calling in the money at the end of the three years is a condition of the liability of the surety. The Court will look at the nature and substance of the transaction. The fact of the defendant's being a surety for Evison cannot be ignored: and his rights cannot be less by reason of there being a binding contract with him.

\*807] *Kemplay*, in reply.—Walmsley was no party to the \*collateral agreement. [ERLE, C. J.—Substantially, it is all one transaction.] In *Watson v. Alcock*, the creditors failed in the performance of a most important condition; and the surety was materially prejudiced thereby. Here, the position of the surety is not altered. The creditor has simply abstained from enforcing payment of the note.

ERLE, C. J.—I am of opinion that the defendant is entitled to judgment on this demurrer. The action is brought against one of the makers of a joint and several promissory note payable on demand. The defendant pleads, by way of equitable defence, that he made the note jointly with one Evison, for the accommodation of Evison, and as his surety only, to secure payment of a loan of 200*l.* then made by the plaintiff to Evison, and that, at the time of the making of the note, the plaintiff, having notice of the premises, agreed with the defendant, in consideration of his making the note as such surety, that he the plaintiff would call in and demand payment of the note from Evison within three years from the date thereof, and that such agreement should be endorsed on the note. The plea then goes on to state that the plaintiff thereupon endorsed on the note "This note is to be paid off within three years from date," which memorandum was signed by Evison, but that by mistake of all parties it was omitted to be mentioned in the memorandum that the plaintiff was to call in and demand payment of the note within the three years. It then goes on to allege that the plaintiff neglected to call in and demand payment of the note within the period aforesaid, whereby he lost the means of obtaining payment from Evison, who had become and was insolvent. The question is, whether, as the defendant made the contract as surety for \*808] Evison, to the knowledge of the \*plaintiff, he as surety is discharged by the plaintiff's laches. I take the principle to be deduced from the cases which have been cited to be this, that, where the surety enters into the contract of suretyship in consideration of something to be done by the creditor, if the latter omits to perform that condition, the surety is discharged. The relation of principal and surety is one which is perfectly well known to the law. *Pooley v. Harradine*, 7 Ellis & B. 431 (E. C. L. R. vol. 90), and *Greenough v. McClelland*, 30 Law J., Q. B. 15, have recognised the rights and liabilities arising out of that relation, where the contract is silent on the

subject. The well-known rule of law is, that, if the creditor, without the consent of the surety, enters into a contract whereby time is given to the principal debtor, the surety is discharged; because the law has imposed upon him the duty of using due diligence against the principal, and at all events precludes him from giving time by a binding contract. That is a perfectly well-known doctrine, arising out of the trilateral contract of suretyship. Two cases have been cited where this right of the surety was created at the time the liability was incurred. One of these was *Watts v. Shuttleworth*, 5 Hurlst. & N. 235.† There, Watts entered into a contract with Harrap for the completion of certain warehouse fittings for a given sum, to be paid by instalments as the work proceeded. Watts undertook to insure the fittings against fire at such time and for such amount as the architects might consider necessary. Shuttleworth became surety for the due performance of the work by Harrap, knowing that Watts had undertaken to insure. After Watts had made considerable advances, an accidental fire destroyed fittings to a large amount in Harrap's workshops, which the plaintiff had omitted to insure. Harrap becoming insolvent and unable to complete the work, Watts sued Shuttleworth on his [\*809 guarantee. The defence set up by Shuttleworth was, that, if Watts had insured according to his undertaking, peradventure Harrap might have performed his contract,—that it was a condition of his liability as surety that Watts should insure, and that he was damnified by the non-performance of that condition. The question was whether Watts's laches discharged Shuttleworth in toto: and the Court held that it did; that it was not a question how much the surety was damnified; but that the engagement of Watts to insure was the condition upon which Shuttleworth consented to become surety; and that the omission to perform that condition discharged him. The same principle is recognised in *Watson v. Alcock*, 22 Law J., Ch. 858. The Craven Bank had been applied to by Watson Jun., to lend him a sum of money, which they agreed to do upon Watson Sen. agreeing to become surety. Part of the agreement was that the bank should take from Watson Jun. a warrant of attorney, upon which a judgment was to be entered up, and which the bank engaged to enforce upon receiving notice so to do from Watson Sen. The bank accordingly took a warrant of attorney, and, upon receiving notice, put it in force against the goods of Watson Jun. Watson Jun. having become bankrupt, his assignees, discovering that the warrant of attorney had not been filed within the time required by the statute, brought an action against the bank, and recovered the value of the goods so seized, on the ground that the warrant of attorney was void. And the Lords Justices were of opinion that it was a condition of the father's liability that the bank should take from the son a valid warrant of attorney; and that their omission to do so relieved him from liability as surety. No question was raised there whether the goods taken would have sufficed to satisfy the debt. \*But it was held that the non-performance of the condition released the surety. This case has been very ably [\*810 argued on both sides: but I feel bound to say that Mr. *Brown's* argument has satisfied me that the defendant is entitled to judgment.

WILLIAMS, J.—I am of the same opinion. It appears from the averments in the plea the validity of which is in question, that, upon the

occasion of the defendant becoming surety for Evison, he said to the plaintiff, "I will consent to become surety for Evison, but only upon the understanding that the money shall be called in within three years from the date of the note,"—or, in other words, "I will not guaranty his solvency for an indefinite time, but only for three years." The creditor allows the three years to go by, and does not demand payment. The plea discloses the additional fact that by the delay the creditor had lost the means of obtaining payment from the principal debtor, who had become insolvent; which makes it incumbent on the defendant (if material) to show that Evison was solvent during the period of three years from the date of the note, and had since become insolvent. The only difficulty I have felt arises upon the argument of Mr. *Kemplay*, that the undertaking of the creditor to call in and demand payment of the note within three years is not a general incident of the contract of suretyship, like the obligation not to give time to the principal debtor, but is a special incident of this particular contract, and therefore the subject of a cross-action. But I am relieved from that difficulty by the case of *Watson v. Alcock*, 22 Law J., Ch. 858. In that case, upon the taking of a guarantee for the repayment of advances to a customer, a banker took from the customer a warrant of attorney to secure the debt, and entered into an agreement \*811] with the surety that he (the banker) would, at any time when requested by the surety, enter up judgment and levy execution against the customer, the principal debtor, on the warrant of attorney. The surety made a request to that effect, and the banker took the goods of the customer in execution to an amount sufficient to satisfy the debt. On the bankruptcy of the customer, the assignees brought an action against the banker for the value of the goods, and obtained a verdict in consequence of the banker's having neglected to comply with the requirements of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), by not filing the original warrant of attorney or a true copy in proper time. And it was held by the Lords Justices that the neglect of the banker operated as a discharge of the liability of the surety. The only difference between that case and the present, is, that, in *Watson v. Alcock*, the contract by which the banker undertook to enforce the warrant of attorney was one to which the creditor, the debtor, and the surety were all parties; whereas, here, the debtor was no party to the memorandum. But I do not think that makes any real difference in principle: and the case of *Watson v. Alcock* at all events shows that a Court of equity will relieve the surety, where the creditor has failed to perform the condition which was the consideration for the surety's entering into the liability, and the latter has sustained prejudice therefrom. I think it is impossible to say, that, if the facts disclosed by this plea are true, the surety has not been prejudiced.

Judgment for the defendant.

The issues of fact came on to be tried before Erle, C. J., at the sittings in London after last Hilary Term, when the learned Judge \*812] allowed the defendant to add a fourth plea to the first count, to the following effect,—That he the defendant made the said note jointly with one John Evison, for the accommodation of the said John Evison, and as his surety only, to secure payment of a loan of

200*l.* then made by the plaintiff to the said John Evison, with interest thereon, and that, at the time of the said note being made and signed by the defendant and the said John Evison, a memorandum was by agreement between the plaintiff, the said John Evison, and the defendant, endorsed upon the said note, and signed by the said John Evison, which said memorandum was in the words following, that is to say, "Memorandum: This note is to be paid off within three years from date: John Evison:" and the defendant says that the plaintiff did not compel payment of the said note within the said period of three years, which elapsed before the commencement of this suit.

A verdict having been found for the plaintiff on the first three issues, and for the defendant on the fourth,

*Macaulay*, Q. C., in Easter Term, obtained a rule calling upon the defendant to show cause why the plaintiff should not have judgment for 214*l.* debt and costs upon the verdict found for him upon the first three issues on the trial, pursuant to leave reserved, and why the plea added at the trial should not be struck out, or why the plaintiff should not have judgment for the said debt and costs notwithstanding the verdict found for the defendant on the issue on that plea, on the ground that the same was bad in law.

*Field* showed cause.—The omission on the part of the creditor to call in the money from the principal debtor at the stipulated time, affords a good answer in \*the mouth of the surety in equity as well as at law: *Watson v. Alcock*, 22 Law J., Ch. 858; [\*813 *Pooley v. Harradine*, 7 Ellis & B. 431 (E. C. L. R. vol. 90); *Watts v. Shuttleworth*, 5 Hurlst. & N. 235.† [*ERLE*, C. J.—An agreement to give time, whereby the creditor binds himself to hold his hand, discharges the surety. To make the added plea a good answer, must you not make out that the creditor stipulated that he would call in and demand payment of the note at the end of the three years?] Looking at the surrounding circumstances, and at the decision of the Court upon the third plea, it is submitted that the plea now before the Court affords a good answer to the action. [*WILLIAMS*, J.—No leave was reserved to strike out the fourth plea; and the rule does not ask for a new trial on the ground that the verdict was against the evidence: we can therefore only look at the record, and consider whether the plea, assuming it to have been proved in the way most favourable to its validity, is an answer to the action. *BYLES*, J.—The material allegation in the plea which was before the Court on demurrer is not in this plea, nor is there anything tantamount to it. If the memorandum had been signed by all the parties, it would have converted the note into a note payable in three years, and then there can be no pretence for saying that there was any obligation on the payee to sue upon it at once.] The note still remains a note payable on demand. The contract is not altered by the endorsement. The obligation on the part of the plaintiff to cause the note to be paid off within three years is independent of the contract on the face of the note.

*Flower* (with *Macaulay*), contra, was not called upon.

*ERLE*, C. J.—I am of opinion that the fourth plea \*which was added at the trial does not disclose any valid defence to the [\*814 action. If it had been shown that there was any agreement between

the plaintiff and the defendant and Evison to the effect stated in the plea which was before us on demurrer, the defendant might have established a good defence: but all that appears here is, that the defendant signed the note as surety for Evison, that by agreement of the parties a memorandum was at the time endorsed on the note, "This note is to be paid off within three years from date," and that the note was not enforced against Evison within the three years. All that I can understand from the memorandum is, that Evison held out a hope to the plaintiff and the defendant that he would be able to pay off the loan within the time mentioned. I cannot construe it as an engagement on the part of the plaintiff that he would at the end of the three years bring an action against Evison if the note then remained unpaid. It appears to have been a friendly transaction. The memorandum amounts to no more than an intimation of a mutual understanding, that, although the note upon the face of it purported to be payable on demand, it was to be understood that three years' time was to be given. There is no obligation on the plaintiff to bring an action against the principal debtor at the end of the three years if the whole amount advanced by him on the note was not paid off within that time. Short of that, the plea affords no defence. The plaintiff must therefore have judgment for the whole amount of debt and costs notwithstanding the verdict on the issue on the fourth plea.

WILLIAMS, J.—I am of the same opinion. A verdict was taken for the plaintiff at the trial on all the issues except on that joined on the plea which was allowed \*to be added. That being so, and \*815] there being no leave reserved to move to strike out the plea, and no application to have a verdict on that plea for the plaintiff, or for a new trial, the question reduces itself simply to a motion for judgment non obstante veredicto. All we can do, therefore, is to look at the record, and see whether, notwithstanding the verdict for the defendant, the plaintiff is entitled to judgment on that plea. As we cannot for that purpose look out of the record, we are bound to assume that the plea was proved in such a sense as will support the verdict if by any evidence of the surrounding circumstances the memorandum set out in the plea could be read so as to amount to a defence. I think it is impossible to imagine any state of circumstances which could make this amount to a good plea. It could only be so if it could be read as disclosing an agreement on the part of the plaintiff that he would sue the principal debtor in the event of the note remaining unpaid at the expiration of the three years. I think it is impossible to say that it does amount to such an agreement, and therefore that it affords no answer.

WILLES, J., concurred.

BYLES, J.—I am entirely of the same opinion. I was no party to the decision upon the demurrer to the third plea: but it seems to me that the decision was strictly correct. The plea on that occasion alleged an agreement between the plaintiff, the defendant, and Evison, that the amount of the note should be called in and demanded at the end of three years, and then alleged a breach of that agreement, and a damage resulting to the defendant. All that is wanting here. The memorandum set out in the fourth plea does not purport to be a con-

tract by the defendant with the \*creditor at all. It is evidently [816  
 a mere agreement between the principal debtor and the surety  
 that the former will pay off the advance within three years. It is  
 impossible to come to any other conclusion than that this is a bad  
 plea. Rule absolute accordingly.

### NAEF and Another v. MUTTER. May 27.

A writ of summons having been issued against a person who professed to carry on the business of a carrier in London, having an office and an agent there who received and forwarded goods to all parts of the kingdom, a Judge at Chambers,—upon an affidavit stating these facts, and that a copy of the writ had been served upon the agent, and alleging that the plaintiff had made all reasonable efforts and used all due means in his power to serve the defendant personally, but had not been able to do so, and that he verily believed that the writ had come to the knowledge of the defendant, and that he evaded service thereof,—made an order for leave to proceed, under the 18th section of the Common Law Procedure Act, 1852 :—

The Court refused to set aside the order, upon a mere affidavit by the agent (the defendant himself making none), that the defendant, at the time of the commencement of the action, and long prior thereto, was and still remained resident at Edinburgh, out of the jurisdiction of this Court, and had no residence except in Scotland, and did not and never did reside at the London house, which was only a branch-office for the receipt and despatch of goods,—not being satisfied that the defendant was not in London at the time of the issuing of the writ.

Whether the order might not under the circumstances have been sustained, even if it had clearly appeared that the defendant actually resided and was in Scotland at the time of the issuing of the writ,—*quære*.

THIS was an action against the defendant, a general carrier and forwarding agent carrying on business at No. 38, Watling Street, in the city of London, and elsewhere, under the style and firm of Thomas Howey & Co., to recover the value of a bale of silk (375*l.*) which had been delivered by the plaintiff's agent in London to the defendant's agent at 38 Watling Street, to be forwarded, but which bale had been lost.

The writ of summons was issued on the 12th of March last, and repeated efforts had been made to serve the defendant at 38 Watling Street, but he could never be found, and his attorneys, to whom application had been made for an undertaking to appear to the writ, had refused to do so.

Upon an affidavit of these facts, and alleging that the deponent had made all reasonable efforts and used \*all due means in his [817  
 power to serve the defendant personally with a copy of the  
 said writ, but had not been able to do so: and that he verily believed  
 that the writ had come to the knowledge of the defendant, and that  
 he evaded the service thereof,—the plaintiff obtained from Willes, J.,  
 an order for leave to proceed, pursuant to the 18th section of the  
 Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76.

An application was afterwards made to Byles, J., at Chambers, to rescind the order; but he referred the parties to the Court, with liberty to the defendant to file further affidavits.

*Francis* accordingly moved to set aside the order of Willes, J., upon the ground that the learned Judge had no jurisdiction. The affidavits upon which the motion was founded stated that the defendant at the time of the commencement of the action, and long prior thereto, was,

and still remained, resident at Edinburgh, in Scotland, out of the jurisdiction of this Court, and had no residence except in Scotland, and that he did not and never did reside at No. 38, Watling Street; that the defendant was a Scotsman, and had to the best of the deponent's belief resided all his life at Edinburgh, and carried on his business as a carrier there; and that the business carried on at No. 38, Watling Street, was only that of a branch office for the receipt and despatch of goods and merchandises to all parts of the country. The only deponents were the defendant's attorney, and one Rutherford, who described himself as of "No. 38, Watling Street, in the city of London, carrier's agent," but who was stated to be the defendant's manager.

*Hesketh v. Fleming*, 24 Law J., Q. B. 255, was relied on as a governing authority. It was there held by Coleridge, J., that, if a writ \*818] of summons be issued for \*service within the jurisdiction against a defendant supposed to be resident in England, and a Judge's order be obtained to allow the plaintiff to proceed to judgment if no appearance be entered by a specified time, on affidavits showing that reasonable efforts have been made to effect service, but in vain, and that the writ has come to the defendant's knowledge, the defendant is entitled to have the order set aside, on his showing that he has been resident out of the jurisdiction ever since the issuing of the writ. Parties resident in Scotland or Ireland are expressly excluded from the operation of the 18th section of the Common Law Procedure Act, 1852.

*Kingdon* showed cause in the first instance, relying upon the affidavit used at Chambers and a further affidavit verifying the defendant's business card, in which he described himself as carrying on business as a carrier at No. 38, Watling Street, under the name of John Howey & Co. The 17th section of the Common Law Procedure Act, 1852, after enacting that the service of the writ of summons, wherever practicable, shall be personal, goes on to provide, that, "in case it shall appear to the Court or a Judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such Court or Judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Court or Judge may seem fit." Whatever be the proper construction of the words "residing or be supposed to reside," in the 2d section of the Common Law Procedure Act, the defendant has so held himself out as residing in England as to estop him from \*819] now \*controverting the fact. His card amounts to a representation that he resides or is to be met with at No. 38, Watling Street. He himself makes no affidavit; and, though his agent, Rutherford, swears that the defendant resides in Scotland, he does not swear that he does not occasionally reside in England. It is perfectly consistent with all that is stated, that the defendant may have two residences, one in Edinburgh, the other in London. In *Butler v. Ablewhite*, 6 C. B. N. S. 740 (E. C. L. R. vol. 95), it was held that a man may have two permanent places of residence, either of which would satisfy the concurrent jurisdiction clause of the County Court

**A**ct; and in *Curtis, app., Blight, resp.*, 11 C. B. N. S. 95 (E. C. L. R. vol. 103), it was held that an objector (under the Registration of Voters Act) who has at the time of signing the notice of objection *bonâ fide* ~~two~~ places of abode, may describe himself as of either. In *Ablett v. Basham*, 5 Ellis & B. 1019 (E. C. L. R. vol. 85), where an attorney sued in person, it was held that he was properly described, under s. 6 of the Common Law Procedure Act, 1852, as of the place where he carried on his business. In *Blackwell v. England*, 8 E. & B. 541 (E. C. L. R. vol. 92), the execution of a bill of sale was attested by a witness who signed as "W. R. C., clerk to Messrs. B. & R., solicitors, Temple." It was in due time filed together with an affidavit which commenced, "I, W. R. C., clerk to Messrs. B. & R., of the same place, solicitors, make oath and say," &c. In the body of the affidavit it was stated that the bill of sale was executed in the presence of the deponent; but there was no further description of the residence of the attesting witness. On the trial of a feigned issue, to try whether the bill of sale was valid against an execution-creditor, it was proved that W. R. C. was clerk to the solicitors, whose office was in King's Bench Walk, that all his business hours were passed there, and that it was the place where he \*would be most readily heard of, but that he took his meals and slept elsewhere. It was held that the description of the residence was sufficient to satisfy the requirements of the 17 & 18 Vict. c. 36, s. 1. (a) [*WILLES, J.*, referred to *Wilson v. The Caledonian Railway Company*, 5 Exch. 822.†]

*Francis*, in support of his motion.—None of the cases cited have any application: in all of them the description of the party was obviously the proper one. Mere address, however, will not do. In *Simpson v. Ramsay*, 5 Q. B. 371 (E. C. L. R. vol. 48), "to be heard of in London at Peele's Coffee-House" was held not to be a good description of a defendant's residence within the 2 W. 4, c. 39, s. 1. "The service," said *Wightman, J.*, "must be made in the county in which the defendant is described in the writ as residing, and not elsewhere. Has that been done in this case?" The present case is clearly within the judgment of *Coleridge, J.*, in *Hesketh v. Fleming*, where he observes,—"It was said that the Act of Parliament contemplated the issuing of the writ of Sched. A. No. 1, in the case of an actual and of a supposed residence of the defendant within the jurisdiction, and that this was a case of supposed residence; and that, if the order is to be set aside, to what purpose are the words 'supposed residence' introduced in s. 2? The answer to be given to that observation, I think, is, that those words were inserted to meet the case of a party who believes that the defendant resides within the jurisdiction, though he cannot swear positively to the fact of his residence." The affidavits, it is submitted, abundantly negative the fact of the defendant's having any other place of abode than Edinburgh at the time of the issuing of the writ.

\**ERLE, C. J.*—I am of opinion that there should be no rule in this case, it being clear to my mind that there was jurisdiction to issue the writ. The language of the 2d section of the Common Law Procedure Act, 1852, which authorizes the issuing of the writ of summons, is very wide. It enacts that all personal actions brought in Her Majesty's superior Courts of common law, where the

(a) And see *Attenborough v. Thompson*, 2 Hurlst. & N. 559.†

defendant is residing or *supposed to reside* within the jurisdiction of the said Courts, shall be commenced by writ of summons (in the form given in the schedule), and that in every such writ and copy thereof the place and county of the residence or *supposed residence* of the party defendant, or wherein the defendant shall be or *shall be supposed to be*, shall be mentioned. All personal actions, therefore, are to be commenced by writ of summons, and may be brought against any person residing or supposed to reside within the jurisdiction of the Courts of England. Now, the word "reside" has a great variety of meanings, according to the subject-matter and the objects and purposes of the legislature. In this section, it was evidently intended to be construed in its largest and widest sense: but, for the purpose of disposing of this motion, I am of opinion that it is not necessary to define its meaning as used in this statute, because the conclusion I have arrived at from the affidavits which have been produced before us, is, that this defendant is on this occasion estopped from saying that he did not reside in London. He held himself out as having business offices in Watling Street, London, where he carries on the business of a common carrier. I think the affidavits disclosed abundant ground to authorize the plaintiff in issuing his writ under the 2d section of the statute. Then, under the 17th section, my Brother Willes had authority to make the order complained of, provided it was made out \*822] to his satisfaction \*that the writ had come to the defendant's knowledge or that he wilfully evaded service thereof. That section enacts that "the service of the writ of summons, wherever it may be practicable, shall, as heretofore, be personal, but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the Court out of which the writ of summons issued, or to a Judge, and, in case it shall appear to such Court or Judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such Court or Judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Court or Judge may seem fit." I think, upon the materials which were before him, the learned Judge properly made the order. The defendant now comes to the Court to ask to have that order set aside, and to be exempted from the jurisdiction of the Court. But even now the defendant himself makes no affidavit. I do not say what my decision would have been if the case had simply rested upon the defendant's holding himself out as a person carrying on business at No. 38, Watling Street, London, nor whether his place of residence for the purpose of this statute must necessarily mean the place where he sleeps. It is enough to say, that, upon the affidavits now before the Court, I am not satisfied that the defendant was not in England at the time of the issuing of the writ, and perfectly cognisant of the proceedings against him. The defendant himself, as I before observed, makes no affidavit; and all that his agent Rutherford swears, is, that, at the time of the commencement of the action, and long prior thereto, the defendant was and still remained resident \*823] at Edinburgh, out of the jurisdiction \*of the Court, and had no residence except in Scotland, and that he did not and never

did reside at No. 38, Watling Street; that the defendant is a Scotsman, and has to the best of the deponent's belief resided all his life at Edinburgh, and carried on his business as a carrier there; and that the business carried on at No. 38, Watling Street, was only that of a branch office for the receipt and despatch of goods to all parts of the country. And it must be remembered that this affidavit is made after the defendant's residence had been made the subject of contention before the learned Judge, and time afforded for further information. Under these circumstances, I am disposed to make every fair presumption against the defendant. If he has chosen to leave the matter in doubt, it is his own fault if he sustains damage therefrom.

WILLES, J.—I am of the same opinion. It appears to me that the affidavits which have been produced on the part of the defendant are quite insufficient to found this application, and that the absence of the defendant's own affidavit is fatal. I am not sure that the 18th section has the effect which Mr. *Francis* contended for. In order to a right understanding of the 2d, 17th, and 18th sections, it is necessary to compare their language, and not to look at each separately. The 18th section applies only to the case of a British subject residing out of the jurisdiction of the superior Courts, elsewhere than in Scotland or Ireland (words which were inserted in the bill whilst under discussion in Parliament). If it was intended to restrict him in his proceedings against a person residing in Scotland or Ireland to the course pointed out in the 19th section, which provides for the case of a person residing out of the jurisdiction, not being a British subject, the contention of Mr. *Francis* would be successful. But \*the Courts of Westminster Hall unquestionably possessed jurisdiction by way of [\*824 outlawry in such a case as this, before the passing of the Common Law Procedure Act. The proceeding under s. 18 is substituted for that. When we look at s. 17, we find a general provision for substituted service in cases where it shall be made appear to the Judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service. I see nothing there to confine the words to the case of a service in any particular place. Then, go back to s. 2, where the language of the Uniformity of Process Act, 2 W. 4, c. 39, s. 1, is preserved,—“in every such writ and copy thereof the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned.” The object of the introduction of those words was, to indicate the county in which the subsequent proceedings were to be taken. The words “or shall be supposed to be” seem to point to a state of things where the residence of the defendant cannot be ascertained, but where there is good reason to believe that he may be found at the place mentioned in the writ. That would seem to include the case of a person carrying on business as if resident in England. There is no ground for thinking that the legislature intended to take away any jurisdiction which existed before. For these reasons, I feel induced by the argument of Mr. *Kingdon* to change my mind, and to think that the order I made would have been made valid even if the defendant were shown to have been actually residing in Scotland at the time the writ issued. In saying this, however, I desire to be

understood as reserving to myself the opportunity of forming a more deliberate opinion whenever the point may present itself for decision.

\*825] \*BYLES, J.—I thought, when the case was before me at Chambers, that there was considerable difficulty. But, upon further consideration, I think it is quite unnecessary to put any particular construction upon the words “residing or supposed to reside,” in the 2d section of the Common Law Procedure Act, 1852. “Residence” has on many occasions been held to be a flexible expression. It is enough for the decision of the present case to say that the defendant on his card represents himself as either sleeping by night or being during the daytime at No. 38, Watling Street, London. He now makes no affidavit, although the case was adjourned for the purpose of affording an opportunity for explanation; and the affidavit of his agent is very vague and unsatisfactory. There being, therefore, no evidence to contradict the *prima facie* case on the part of the plaintiff, I think this rule must be refused.

KEATING, J.—I am of the same opinion. The defendant has furnished a *prima facie* case against himself.

Rule refused,—the costs to be plaintiff's costs in the cause.

END OF TRINITY TERM.

## \*IN THE EXCHEQUER CHAMBER.

[\*826

## JONES v. TAPLING. July 12.

A., being possessed of a house of three stories, in Wood Street, Cheapside, with a window in each story, lowered and enlarged the windows on the first and second floors, and added two new stories to the building, with windows therein. The altered windows on the first and second floors each occupied in part the space before occupied by the ancient windows: *the window on the third floor remained as it had always been.* B., in rebuilding his premises opposite, obstructed *the whole* of the windows of A.'s house,—it being impossible (as found in a special case) to obstruct the new lights without at the same time obstructing the old ones. A. thereupon stopped up his new windows, and restored the old ones to their original state, and then required B. to remove the obstruction, which he refused to do:—

Held, by Bramwell, B., and Blackburn, J., that the original obstruction was not justifiable,—controversing the principle laid down in *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 82), and adopted in *Hutchinson v. Copestake*, 9 C. B. N. S. (E. C. L. R. vol. 99).

Held by Wightman, J., and Crompton, J., that the original obstruction was justifiable but that the defendant was bound to remove it upon the abandonment by the plaintiff of the usurped lights.

Held, by Pollock, C. B., and Martin, B., that, the obstruction being lawful at the time of its erection, its continuance was not unlawful.

The judgment of the Court of Common Pleas was therefore affirmed.

ERROR upon a decision of the Court of Common Pleas upon a special case: vide 11 C. B. N. S. 283 (E. C. L. R. vol. 103).

The short facts were these:—The plaintiff, being possessed of a house of three stories, in Wood Street, Cheapside, with a window in each story, lowered and enlarged the windows on the first and second floors, and added two new stories to the building, with windows therein. The altered windows on the first and second floors each occupied in part the space before occupied by the ancient windows: *the window on the third floor remained as it had always been.* The defendant, in rebuilding his premises opposite, obstructed *the whole* of the plaintiff's windows,—it being impossible (as found in the special case) to obstruct the new lights without at the same time obstructing the old ones. The plaintiff thereupon stopped up the new windows, and restored the old ones to their original state, and then required the defendant to remove the obstruction, which he refused to do.

The Court of Common Pleas held unanimously,—upon the authority of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), and *Hutchinson v. Copestake* (in error), 9 C. B. N. S. 863 (E. C. L. R. vol. 99), \*that, inasmuch as the defendant could not obstruct the new lights, as he had a right to do, without at the same time ob- [\*827 structing the ancient lights, he was justified in the obstruction of them all.

Byles, J., and Keating, J., further held, that, the obstruction being lawful at the time of its erection, the defendant was not bound to remove it on the plaintiff's closing his new and usurped lights, and giving notice thereof to the defendant. Erle, C. J., and Williams, J., however, held that the continuance of the obstruction after the cause for its erection had been withdrawn, was an unlawful act.

The Court being thus equally divided in opinion, and the parties

being desirous of taking the opinion of a Court of error, Keating, J., withdrew his opinion, and judgment was entered for the plaintiff.

A writ of error was thereupon brought, and the case was argued in the Exchequer Chamber at the sittings in error after last Hilary Term, before Pollock, C. B., Wightman, J., Crompton, J., Martin, B., Bramwell, B., and Blackburn, J.

*Archibald* (with whom was *Hawkins*, Q. C.), for the plaintiff in error (defendant below).—The plaintiff below, it is submitted, had no right of action either for the original obstruction of his lights or for the continuance of the obstruction. The easement which he formerly enjoyed was forfeited by the attempted encroachment, or, at all events, the plaintiff, having by his own act suspended the easement and justified a permanent obstruction, cannot after such an obstruction has been erected at great expense resume the easement. That the original obstruction was lawful is clear from the cases of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), and *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. vol. 99). By our law, no action lies for opening \*828] a window to the \*annoyance of a neighbouring owner: per Le Blanc, J., *Chandler v. Thompson*, 3 Campb. 80. The only practicable mode of resisting the encroachment is by actual obstruction: and, if there be a justification for erecting an obstruction, in order to prevent the acquisition of a right by twenty years' user, the right to maintain the obstruction necessarily follows. This is strictly consistent with the nature of the right claimed by the dominant owner, which, it is submitted, is a right by implied grant, even since Lord Tenterden's Act, 2 & 3 W. 4, c. 71, which merely alters the mode of proof and shortens the period of prescription: *Bury v. Pope*, Cro. Eliz. 118; *Daniel v. North*, 11 East 372; *Barker v. Richardson*, 4 B. & Ald. 579 (E. C. L. R. vol. 6); *Bright v. Walker*, 1 C. M. & R. 211;† *Harbige v. Warwick*, 3 Exch. 552.† And it is in strict analogy with the principles of our law to imply a condition not to use the easement to the detriment of the servient tenement. It is a general principle, that, where a party with a limited right over land or a chattel assumes a greater dominion than is consistent with or essential to his right, the exercise of that power to the detriment of third parties works a forfeiture of the actual right: *Co. Litt.* 233 b, 251 a; *Cooper v. Willamott*, 1 C. B. 672 (E. C. L. R. vol. 50). An easement or prescriptive right is not forfeited by an alteration in the mode of enjoyment which imposes no increased burthen on another; as, the altering a fulling-mill into a corn-mill (*Luttrell's Case*, 4 Co. Rep. 86 a), raising the walls of a house (*Thomas v. Thomas*, 2 C. M. & R. 34†), or altering the dimensions of a mill-wheel (*Saunders v. Newman*, 1 B. & Ald. 256). Here, however, a new right would be gained if the encroachment were allowed to continue, and it was impossible to resist the encroachment without in some degree interfering with the easement. This is analogous to the case of a forfeiture incurred by a tenant for life or for \*829] years by \*making a feoffment in fee: *Co. Litt.* 251 b; *Read v. Errington*, Cro. Eliz. 321; 2 Bl. Com. 275; 1 Stephen's Com. 4th edit. 462 (n); Com. Dig. *Forfeiture* (A 1). That such an easement as this may be lost by encroachment or abandonment, appears from the cases of *Garritt v. Sharp*, 3 Ad. & E. 325 (E. C. L. R. vol. 30), 4 N. & M. 834 (E. C. L. R. vol. 30), *Blanchard v. Bridges*, 4 Ad. & E.

176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36), *Cawkwell v. Russell*, 26 Law J., Exch. 34, and *Gale on Easements*, 3d edit. 500.

Then, having by his own act justified the obstruction, the plaintiff cannot, it is submitted, be allowed to resume the original easement. That an easement may be lost by disuse, was ruled by Lord Ellenborough in *Lawrence v. Obee*, 3 Campb. 514, and asserted by Littledale, J., in *Moore v. Rawson*, 3 B. & C. 332 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16), by this Court in *Liggins v. Inge*, 7 Bingh. 682, 5 M. & P. 712, by the Court of Queen's Bench in *The Queen v. Chorley*, 12 Q. B. 515 (E. C. L. R. vol. 64), by *Kindersley, V. C.*, in *Wilson v. Townend*, 30 Law J., Ch. 25, and by *Sir J. Romilly, M. R.*, in *Cooper v. Hubbuck*, 7 Jurist N. S. 457. And whether it be by license, by abandonment, or by encroachment, makes no difference. With this agrees the Civil law: see the passage cited from the Digest, Lib. VIII., Tit. II., *De Servitutibus Prædiorum Urbanorum*, § 6, in *Gale on Easements*, 3d edit. 484. The Code Napoleon has express provisions for regulating the enjoyment of these rights: see Book II., Cap. II., Tit. IV., § III., and articles 690–699. See also *Toullier's Droit Civil Français*, Vol. 3, Book 2, Tit. 4. The American law leans strongly against such easements: *Parker v. Foote*, 19 Wendell R. 309. To hold that the defendant is bound to remove a structure the erection of which was lawful at the time, merely because the plaintiff has thought fit to obscure (it may be temporarily) his new and usurped lights, will, it is submitted, be imposing a grievous burthen upon \*the defendant, who is not shown to have been guilty of any [\*830 wrongful act.

*Cleasby, Q. C.*, for the plaintiff below.—The window on the third floor remaining in its original state, the alteration of those on the first and second floors could not justify the defendant in obstructing the access of light and air to that window. Assuming, therefore, that *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. vol. 99), was well decided, it has no application here. The plaintiff was guilty of no unlawful act in opening the new windows or enlarging the old ones: nor can the unauthorized opening of a new light destroy the party's right to the old one. But, assuming that the obstruction of the whole of the windows was warranted upon the principle laid down by the Court of Queen's Bench in *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), and adopted by this Court in *Hutchinson v. Copestake*, the defendant, at all events, was not justified in continuing the obstruction when the necessity for it no longer existed. At most the plaintiff's right was only suspended. *Ward v. Ward*, 7 Exch. 838,† *Binckes v. Pash*, 11 C. B. N. S. 324 (E. C. L. R. vol. 103), *Wilson v. Townend*, 30 Law J., Ch. 25, and *Cooper v. Hubbuck*, 31 Law J., Ch. 123, were cited.

*Archibald* was heard in reply.

*Our. adv. vult.*

There being some diversity of opinion amongst the learned Judges, their opinions were now delivered seriatim, as follows:—

BLACKBURN, J.—This was a special case stated for the opinion of the Court of Common Pleas, with power to draw inferences of fact. The Court having been equally divided in opinion, the junior Judge  
C. B. N. S., VOL. XII.—31

\*831] withdrew \*his opinion, and judgment was entered for the plaintiff. From this judgment there has been an appeal. I think that the judgment as it stands is right, and should be affirmed.

Before stating my reasons for this judgment, I will recapitulate the facts stated in the case, and the inferences of fact which in my opinion should be drawn from them, as it is on these I give judgment. So far as they raise the present point, they are short, and in my opinion clear.

The plaintiff purchased a house, No. 107, Wood Street, consisting of three floors, in each of which was one ancient window. Having purchased it, he made alterations in the windows in the first and second floors. Whether these two altered windows continued privileged after these alterations, depends, according to the decision in *Hutchinson v. Copestake* (in error), 9 C. B. N. S. 868 (E. C. L. R. vol. 99), on a question of fact, viz., whether these alterations were so great that the two altered windows on the first and second floors could not be considered as continuations of the two ancient windows on these floors. This question of fact is one which it is unnecessary to decide: for, the question now raised depends on the right to the ancient window on the third floor, which was untouched, and remains in precisely the state in which it always was; and there is no pretence for saying that the obstruction of the unaltered window in the third floor was necessary in order to obstruct the altered windows on the first and second floors below it. But the plaintiff, besides altering the old first and second floors, also built a new fourth and a new fifth story, in each of which he put a new window; and it was found in the case as a fact that these new windows were so situated that it was impossible for the owners of the adjoining property to obstruct them without also

\*832] obstructing to \*an equal or greater extent the windows below. I think this very improbable; but I cannot take on myself to say that it might not be impossible to obstruct the upper windows by means of poles and boards, and therefore I will accept this fact as it is stated, though doubting much its accuracy.

There is nothing stated in the case tending to show that the plaintiff intended to abandon his right to the ancient unaltered window on the third floor; and I draw the inference of fact that he did not so intend, and that there was nothing from which the defendant could reasonably suppose that he did intend to abandon it. I mention this inference of fact for the purpose of showing, that, in my opinion, no question arises on the doctrine discussed in *Stokoe v. Singers*, 8 Ellis & B. 81 (E. C. L. R. vol. 92). I completely approve of the decision in that case; but the above finding of the facts prevents it from being applicable to the present case. But I also find, as an inference of fact, that the plaintiff did intend his new windows on the fourth and fifth stories to be permanent, and that he so conducted himself as to induce the defendant to believe that these windows were intended to be permanent, and that, if they were left unobstructed for twenty years, they would become privileged.

The defendant, who owned adjoining premises, proceeded to build on them in the manner in which he would have been entitled to do if there was no privileged window on the plaintiff's third floor; and he built so high as to obstruct both the ancient window on the third floor

and the new windows on the fourth and fifth floors. The plaintiff protested against his doing so, and cannot be considered as meaning to license this, or to induce the defendant so to build: but, according to *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 88), the throwing out of the new windows above the ancient \*window rendered the obstruction lawful; and the defendant built while the [\*833 obstruction was, according to that case, lawful:

The plaintiff, under the advice of counsel, blocked up his new windows, and brought this action for the continued obstruction of his ancient and unaltered light, by the maintenance by the defendant of the house which had been erected whilst the defendant was induced by the plaintiff's acts to believe, and, as I find as a fact, was justified in believing, and did believe, that the new windows were to be permanent.

Such being the state of the case, it becomes in my opinion necessary to decide in this,—a Court of error,—whether the owner of land who uses it so as to obstruct an ancient unaltered window, can justify or excuse this obstruction, on the ground that the owner of that ancient privileged window has opened a new and unprivileged one in such a position that it cannot be obstructed without at the same time obstructing the privileged window. The actual point raised, is, whether he can justify continuing the obstruction after the unprivileged windows had been closed: but, to decide that, it is necessary to consider whether the original obstruction was at the time it was erected lawful or excused: and, after carefully considering the opinions of those who differ from me, notwithstanding the respect I entertain for their judgments, I am of opinion it was not.

This question was, I believe, first mooted in the case of *Renshaw v. Bean*, decided in 1852. In that case, Lord Campbell, C. J., in delivering the judgment of the Court, states the material facts to be, that "the plaintiff, about eighteen or nineteen years ago, rebuilt his house, the outward wall being on the old foundation; that he raised it a story higher, putting windows into the new story, and altering the \*dimensions of all the windows in the lower stories, although [\*884 they still embraced portions of the space occupied by the old windows; that the defendant, in the year 1850, rebuilt his house, and raised it a story, to about the same elevation as the plaintiff's; that thereby he obstructed the new windows in the upper story of the plaintiff's house; that, without building a wall similar to the wall of the defendant's new house, the defendant could not have prevented the plaintiff from enjoying the free use of the new windows in the upper story of the plaintiff's new house; and that this wall so raised to its present height darkened and obstructed all the windows in the lower stories of the plaintiff's house." The report professes to set out the special case on which this judgment was given; and in it the facts differ much from those stated in the judgment, for, in the case, it is expressly stated that the number of stories remained the same; but, as was pointed out by Kindersley, V. C., in *Wilson v. Townend*, 30 Law J., Ch. 25, it is immaterial whether the facts really were as stated or not, for, the Court decided the law on the supposition that such were the facts. Lord Campbell proceeds to say that the defendant, "if he did not commit any trespass," was at liberty to interrupt the

the unprivileged windows, so as to prevent them from privileged. I may say, in passing, that this is a proposition assent, so long as the important qualification (if he did not trespass) is not lost sight of. Lord Campbell thence conclusion, that, if in the exercise of this liberty the defendant obstruct ancient windows, "the primary cause of this misfortune plaintiff's own act, in raising his house and opening the windows in it, which had acquired no privilege;" "that the destruction of the privileged portions of \*these windows is a necessary consequence of the unprivileged windows," and excused thereby; and therefore, as is implied, though not said, is no trespass or wrong. And he further proceeds to this defence might be given in evidence under the plea in which was a traverse of the right; for, says he, "the plaintiff by his own acts of excess at all events suspended and lost for his former right, if he has not actually and wholly destroyed it is not quite the same proposition as that enunciated before. I am giving my reasons for dissenting from these conclusions, I proceed to state the subsequent decisions.

*Wilson v. Townend*, the plaintiff, being owner of a house with lights in it, moved for an injunction to prevent the defendant completing a building the effect of which would be to darken plaintiff's ancient lights. The ingenuity of the defendant's legal advisers discovered that two of the windows on the basement floor had been enlarged within the last twenty years, and that windows had at the same time been opened in one of the upper stories. It was contended that the new building was erected for the purpose of obstructing these unprivileged windows, nor that the defendant had complained of them: but it was said that their existence gave a legal right to disregard the ancient windows. The case seems to be well calculated to show that the doctrine in *Renshaw v. Bean*, maintained, might lead to inconvenient results. The Vice-Chancellor, though seemingly not satisfied with that case, would not, on a legal question, overrule the decision of a Court of law, but left the parties to their legal remedy. The case was, I believe, afterwards compromised. It certainly does not, in \*my opinion, add to [6] the authority of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. 1. 83).

In *Cooper v. Hubbuck*, 31 Law J., Ch. 123, the Master of the Rolls approved of *Renshaw v. Bean*, but seemed to think that it was not to be acted upon, except in cases where the alteration was such as materially to prejudice the enjoyment of the adjoining property,—a qualification very difficult to apply in a Court of law.

In this state of the authorities, the case of *Hutchinson v. Copestake*, C. B. N. S. 102 (E. C. L. R. vol. 98), came on. That was a special case stated for the opinion of the Court of Common Pleas, with power to draw inferences of fact. The facts were similar to those stated in the judgment in *Renshaw v. Bean*, with the additional fact that the plaintiff in *Hutchinson v. Copestake* blocked up the new windows in the upper story before action commenced. The Court of Common Pleas held themselves bound by *Renshaw v. Bean*, as being the decision of a Court of co-ordinate jurisdiction, and, without expressing

any opinion of their own, gave judgment for the defendant. From this decision there was an appeal, which was argued in the Exchequer Chamber, before my Brothers Crompton, Bramwell, Channell, Hill, and myself. The decision in *Renshaw v. Bean* was much discussed by us whilst considering that case. Ultimately, it was not necessary to determine whether *Renshaw v. Bean* was well decided, as all of us assented to the law stated by my Brother Crompton in his judgment, viz. that the "lights in respect of which the right of action is sought to be enforced must be substantially the same as the lights which have been gained by user or grant:" and, having in that case power to draw inferences of fact, we all found, as an inference of fact, that no one of the existing windows was substantially a continuation of \*the ancient light, though, in parts, they occupied the same space. [\*837 This finding of fact was sufficient for the decision of the case: and the case of *Renshaw v. Bean* was neither overruled nor affirmed by the Court of error on that occasion.

I have been thus particular in stating what really happened in *Hutchinson v. Copestake*, because Mr. *Archibald* in his argument seemed to think that the case of *Renshaw v. Bean* was affirmed in error on that occasion. In fact, the majority of the Court of error, as then constituted, were prepared, if necessary, to overrule that decision: but they did not do so, and therefore it was still binding on the Judges in the Court of Common Pleas in the present case: and, accordingly, all of them acted on the decision as binding on them, though they appear to have taken different views as to what that decision amounted to, and they came to opposite conclusions as to the results to be arrived at by following out that decision.

My Brother Keating states, that, in his opinion, the principle was, "that the rights of the servient owner in respect of his land, being limited only by the user to which he has assented, and for so long only as it is *substantially* adhered to," "the *essential* misuser by the dominant owner of that right, to the prejudice of the servient proprietor, does not so much confer upon the latter any new rights of obstruction, as that it remits him to his former territorial rights, to the extent to which those conditions have been violated upon which alone his consent to their limitation was given." And my Brother Byles seems to adopt the view that the right is suspended, and is consequently gone when the proprietor of the servient tenement has acted on the supposition that he has been remitted to his original territorial rights whilst it was suspended and he had reason to believe that the unprivileged \*windows opened by the owner of the dominant tenement were [\*838 intended to be permanent. If it were the law that a person opening any new window, however small, in such a position that it could not be obstructed without obstructing an ancient one, forfeited his ancient light, it might lead to very hard and inconvenient results. In *Wilson v. Towhend*, a case actually occurred, in which the owner of adjoining property claimed to be at liberty to build so as to obstruct the whole of the lights of an ancient house, on account of very slight additional windows, of the existence of which he had never complained: and it is quite conceivable that even more extreme cases might arise. This seems to have led the Master of the Rolls, in *Cooper v. Hubbuck*, to suggest that the doctrine could only apply where the

new light materially prejudiced the owner of the servient tenement. My Brother Crompton, in *Hutchinson v. Copestake*, found much fault with this doctrine of the Master of the Rolls. But I presume that the same considerations have led my Brother Keating to use the words "substantial" and "essential" in the passage in his judgment above quoted. I think, however, that these can be no elements in the question. Indeed, I have some difficulty in understanding what is the meaning of the terms "material," "substantial," or "essential," as applied to such a question. Any window will in the course of twenty years become privileged, and then the owner of the servient tenement will be under a restriction not to use his land in such a manner as to obstruct this window. That restriction is the same, whether the window be great or small. It is very true that the amount of the annoyance to the occupier of the land which is overlooked, arising from the intrusion on his privacy, is very materially greater when the window

\*839] is large; but the law does not "protect the right to privacy, as it does that to light and air. It may be that the reason for this distinction given in the old cases, viz. that "light and air are things of necessity, while prospect and privacy are but things of delight," is more quaint than satisfactory: but it is not, I believe, proposed by any one to disturb that distinction now. If it were so proposed, I think more substantial reasons for supporting it might be assigned: but, as it is not so proposed, I only desire to point out that the restriction on the use of the servient land consequent on the privilege acquired by a window depends on its situation, and is independent of its size; and therefore it seems to me, that, if the right to restrict the use of adjoining land so as to obstruct an ancient light, is forfeited by the opening of any new window however large in such a position as that it will become privileged unless that restriction is interfered with, it must be forfeited by the opening of *every* new window in such a position, however small it may be. And it further seems to me that the right, if suspended at all, must be destroyed; so that I think my Brother Byles, having gone as far as he did, ought logically to have gone further, and to have concurred with my Brother Keating altogether.

I agree with what was said in *Stokoe v. Singers*, 8 Ellis & B. 31 (E. C. L. R. vol. 92), that when the owner of the ancient light induces the owner of the land to act upon the belief that he has permanently abandoned his right, he is precluded from saying that he did not intend to abandon the right, and the right is gone, whatever might be his real intention: but that is not because the right was suspended, but because the owner of the right has precluded himself from denying that it was gone. Now, as I have already said, when stating what

\*840] inferences of fact I drew from the statements in the case, "the plaintiff in the present case neither intended to abandon, nor induced the defendant to believe that he intended to abandon, the unaltered window on the third floor. He did intend to add two permanent new windows above it; and, if the legal effect of that was to forfeit his right, it is gone; but he has done nothing to preclude himself from contending that his right still exists.

I do not think that the defendant has made out that in law this does work a forfeiture. I am relieved from arguing this point at length,

because it is dealt with by Erle, C. J., in his judgment below, in a manner to my mind very satisfactory. I will only add that forfeitures have generally been looked upon in English law as odious, and not to be encouraged; so that it seems to me rather contrary to the usual course of law to raise by inference a new cause of forfeiture: and as, confessedly, there is no case or book of authority prior to *Renshaw v. Bean*, in 1852, in which such a ground of forfeiture is suggested, and as it seems to me that it is not analogous to any other known and established cause of forfeiture, I think we should be unwilling to support it, even if we thought it a doctrine convenient in itself, which I do not.

For these reasons, I must dissent from the opinions of my Brothers Keating and Byles.

I agree, in the result, with the judgments below of Erle, C. J., and my Brother Williams. They, sitting in a Court of co-ordinate jurisdiction, were bound to act upon the decision in *Renshaw v. Bean*: but they do not express any opinion that the case was well decided; and I do not think that anything is said by either of them which indicates that, if sitting in a Court of error, they might not agree with me in saying that the case was not well decided. They, however, understand that decision differently from my Brothers Byles and Keating.

\*My Brother Williams states it thus,—“The authorities have established the doctrine, so as to be indisputable *unless in* [\*841] *a Court of error*, that, where the owner of the dominant tenement has exceeded the limits of his admitted right to the access of light and air either by enlarging or altering an ancient window, or opening an additional one, and has thereby put himself into such a position as that the excess cannot be obstructed by the owner of the servient tenement without at the same time obstructing the admitted right, no action can be maintained for the latter obstruction, because it was unavoidably caused by the exercise of the right of the owner of the servient tenement to obstruct the excess, if he should think fit to incur the trouble and expense of thus using his own land: and those grounds would, I think, afford a good plea by way of justification in an action for the obstruction of the admitted right.”

The plea which my Brother Williams suggests has never yet been pleaded in any case. I agree with him that such a plea might be framed, on the authority of *Renshaw v. Bean*. The plea would confess that the plaintiff had an ancient window to which of right light ought to come, and that the defendant obstructed it; but it would excuse this interference with the plaintiff's admitted right, by averring that the plaintiff had in a different part of his building put out a new window looking over the defendant's premises, that, if the access of light to this new window was not obstructed for twenty years it would become indefeasible, and therefore the defendant did obstruct it, and, as he could not otherwise obstruct the new window, he did in so doing necessarily obstruct the old one, doing no unnecessary damage.

I may observe, that, in no one of the cases in which the question has arisen, would such a plea have answered the defendant's purpose, as the facts were always such as would have sup- [\*842]

ported a new assignment that the action was brought for obstructing to a greater extent and for other purposes, and that the obstruction was maintained longer than was necessary for that purpose; and, according to the judgment of Erle, C. J., and Williams, J., in this case, such a new assignment would be good. In truth, the defendant in each of the cases,—*Renshaw v. Bean*, *Wilson v. Townend*, *Hutchinson v. Copestake*, *Binckes v. Pash*, 11 C. B. N. S. 324 (E. C. L. R. vol. 103), and the principal case,—acted as if, according to my Brother Keating's idea, he was remitted without any restriction to his ancient territorial rights; and he built his new house, not in order to stop this new light, but because he thought he was under no obligation to respect the old one. If, therefore, the effect of *Renshaw v. Bean* is merely to excuse an interference with the admitted right to this limited extent, it is of less practical importance.

I have considered this point of the case with unusual care, owing to my respect for the judgment of those who decided *Renshaw v. Bean*, and of my Brothers Crompton and Hill, who in *Hutchinson v. Copestake* were, I believe, inclined to support *Renshaw v. Bean* on this ground. Having done so, I must act on my own opinion; and it seems to me very clear that such a plea is in itself bad, for the reasons I will now give.

It is quite true that the opening of a new window looking into the grounds of another may not only annoy that neighbour, but may often affect the value of his property. I do not doubt that the marketable value of a villa with a garden enclosed by trees, and secluded from public view, would be seriously affected if a fresh story were raised on a neighbouring house, so as to overtop the trees and expose the \*843] garden to the \*view of neighbours: but the law of England considers this no injury. No action lies against him who put up the new window: there is no equity to restrain him from doing so: he has done an act perfectly legal, though it may be annoying to his neighbour. But though, in opening a new window, he has done a lawful act, he does not thereby acquire any right against his neighbour. That neighbour may use his land just as before: if he does it so as to obstruct the unprivileged window, he, in his turn, does a lawful act, though it may be annoying to the owner of the unprivileged window. He does this, not in the exercise of any new right to obstruct that window, but in exercise of his former rights to use his property as before, though it may obstruct that unprivileged window. The motive for exercising the right may be a wish to obstruct the window: but his right is, to use his land as before, without any new restriction. I may seem pedantically punctilious in expressing this: but it seems to me that much of what I consider the fallacy in reasoning of those from whom I differ, consists in laying down as a premise that there is a right to obstruct the new window (which is true in the sense that it is not wrong to do acts otherwise lawful, though they have the effect of obstructing the window), and then reasoning upon it as if it was true in the sense that a fresh right was conferred, and therefore that acts, not otherwise lawful, became excused, if done in exercise of that right. It is also true, that, at the end of twenty years, the new window will, if not obstructed in the interval, become itself privileged, and the owner of that window will have a right to restrict

the owner of the land from using his land so as to obstruct the window thus by lapse of time become a privileged window. As, by the hypothesis, he could not during the interval use his land so as to obstruct this as yet \*unprivileged window, without at the same time [844 obstructing the old one, there is no more extensive restriction imposed upon him by the new window becoming privileged than existed before the new window was opened; but there is a new title acquired to this restriction; and, as it is possible that the two windows may come into different hands, so that the owner of the land, if he wishes to buy up the rights to the lights, may be forced to bargain with two persons instead of one, some inconvenience may arise from this; but it is remote and slight, and indeed it requires some ingenuity to discover that any inconvenience can arise from the double title to the same restriction. The real hardship upon the owners of adjoining land is in cases where privacy is of value: there, if an old privileged window of such size and extent as to be no annoyance is to be respected, it may deprive the owner of the land of the power of obstructing new windows of such size and extent as to destroy his privacy altogether, and not only annoy him, but, as I have already pointed out, seriously affect the value of his property. Still, though this is a great damnum, it is no injuria. No action lies for it: no injunction in equity can be obtained to prevent it.

Now, the supposed plea, if good, must be supported on analogy to those which excuse a trespass to real property, on the ground that it was necessary for the purpose of abating a nuisance erected or maintained by the plaintiff, or an assault or imprisonment as necessary to prevent the plaintiff committing a wrong, &c. In such a case, the plaintiff's right to the possession of his close, or to his personal liberty, is neither destroyed nor suspended; but the defendant is excused because the interference with that right was necessary to prevent an injury to himself by the plaintiff. "The reason," says Blackstone (3 Comm. 6), speaking of the \*abatement of a nuisance, "why the law allows this private and summary method [845 of doing oneself justice, is, because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice." This assumes that what is to be redressed in a summary way, is, an injury which might be redressed by the ordinary course of justice. It would be a strange anomaly if we were to say that we do not approve of the old established doctrine that a mere invasion of privacy is no injury, and, though admitting that this doctrine is so well established that no Court can grant any redress, we were to support the defendant if he takes the law into his own hands, and excuse him if he interferes with a legal right of his neighbour, provided it is done for the purpose of protecting his privacy. Would a plea be good, justifying a trespass on the plaintiff's land for the purpose of obstructing this new window, if it could not otherwise be done? Or, if the plaintiff happened to have a private right of way from his door, could the owner of the servient tenement justify obstructing that right of way, if a new light were thrown out above the door, and that new light could not be obstructed without obstructing the right of way? I suppose it will scarcely be said that such

pleas would be good: indeed, Lord Campbell himself, in *Renshaw v. Bean*, confines the right to obstruct the new window to cases in which the party in doing so commits no trespass. But, why should the defendant be excused from interfering with the right of the plaintiff to light to his window on the third floor, by an act of the plaintiff which would not excuse or justify an interference with any other right of the plaintiff, such as his right to the exclusive possession of his own \*846] land, or his right of way, if he had it? It is true \*that the act of the plaintiff has been that of opening new windows, and the right of the plaintiff which is interfered with is in respect of an old window. So far, there is something in common. "There is lights in both." But, in every other respect, they are as distinct as any other rights, as will be seen from this supposed case. The fourth and fifth stories here might have been separate tenements at the time when the new windows were thrown out, and afterwards, within the twenty years, have come into the same hand as the third floor. I take it, that, if such had been the case, the defendant would have as much excuse for interfering with the third floor window to prevent the plaintiff from continuing and maintaining the new windows as he now has: but it would then have been too obvious for dispute, that the right infringed was a right wholly distinct from that which would at the end of the twenty years be acquired.

It seems to me that the supposed excuse for interference cannot be supported, unless it is extended to justify the interference with any other right of the plaintiff, which I think would be against principle; or unless the right to light is subject to some implied condition that no new lights should be opened; in which case I think my Brother Keating's conclusion would follow.

I have only one more remark to make. It has been said, that, right or wrong, the case of *Renshaw v. Bean* has been decided, and that we should not unsettle the law. I think, if we acted on this principle, we should be abandoning the proper functions of a Court of error. There are cases in which a decision originally erroneous has been so long acquiesced in and acted on that a return to the proper principle would greatly affect existing interests. This is peculiarly the case in questions of conveyancing law. There, the maxim \*847] \*applies "*Communis error facit jus*." But, when we find a modern decision which has been questioned at once, and has led to much litigation, we ought, as it seems to me, in a Court of error, to inquire whether it is consistent with principle, and, if we think it wrong, to overrule it. It has been forcibly observed by an American author of repute,—1 Phillips on Insurance 393, n. 1,—that, to do otherwise, "tends to reduce jurisprudence from a science to an aggregation of dogmas."

I therefore think it right, sitting here in a Court of error, to state distinctly that I think the obstruction of the plaintiff's third-floor window by the defendant was wrongful from the beginning; and that I think that *Renshaw v. Bean*, in so far as it is inconsistent with that conclusion, was wrongly decided, and ought to be overruled; and that it is upon that ground that I think the judgment of the Court of Common Pleas should be affirmed.

BRAMWELL, B.—I am of opinion that this judgment should be

affirmed; and I cannot help thinking, that, if the principles on which the question depends are stated with precision, and steadily kept in view, the case ought to be free from difficulty. Differing from what I know to be my Lord Chief Baron's view as to the question of fact submitted to us, I entirely agree with my Brother Blackburn in his statement of the facts, and of the conclusion and inferences to be drawn, and, indeed, in his reasoning; but, having put my views into the following shape before reading his proposed judgment, I have thought it right to express them.

Where two persons are owners of adjoining lands, each has the common proprietary right to deal with it in such way as he pleases, subject to his injuring neither his neighbour nor the public. Each may \*build or place on his own land a house, with or without [\*848 windows, or a wall or screen, or other thing, with or without the object of dwelling in it, or with or without any other object. If one of them builds on his own land, whether close or near to his neighbour or not, whether with or without windows, he confers no new right on the latter, who may build or place on his land the house, wall, or screen as he might have done before, and no further, though he now may thereby cause what he would not have caused before, viz., a darkening of windows. If, however, he does not exercise his right for twenty years, the window of his neighbour becomes privileged: that neighbour has now *acquired a right* in addition to his proprietary right, viz., a right to have the access of light and air to it unobstructed; and the owner of the land not built on has become subject to a servitude, and has lost his proprietary right to build or place anything on it which shall obstruct the access of light and air to his neighbour's window. So that the one may lawfully build on his own land, and open any number of windows in his building, and by so doing confers no right on his neighbour; the other may build or erect anything on his land, though he obstructs his neighbour's windows; but, if he does not do so for twenty years, he loses his right to do so, and the other gains the right to prohibit its being done. Now, suppose this to have occurred,—suppose the house built, the window opened, the right to prevent its obstruction acquired, and the proprietary right of the neighbour to use his land lost, when by so doing he obstructs the window. Let us suppose that, and that the owner of the building opens a new window in his building,—does he by so doing confer any right on his neighbour? I ask, why? He would not have done so if the building were not twenty years old, as I have shown,—why should he \*now? Does the servient [\*849 owner reacquire his proprietary right to use his land as he thinks fit? Again I ask, why should he? The reason commonly given is, that the new light is wrongful. But it is not. It is not wrongful to build a house with fifty windows next to your neighbour and overlooking him, nor with forty-nine, and at the end of ten or twenty or other number of years to open the fiftieth. And, accordingly, Mr. *Archibald* could only put the case thus,—that it was wrongful to use the acquired right to have the old windows unobstructed, for the purpose of acquiring a similar right to the new one. But it would be a strange thing if precisely the same act, with precisely the same object, should be rightful at one time, but wrongful a year after,

because meanwhile some other window had become privileged. The privileged window is *not used* for that purpose. It may have the effect of preventing the stoppage of the new window, but it is *not used* for that purpose.

The case put by my Brother Blackburn may be cited. Suppose a way to a door granted, and suppose a window opened over the door, looking on the land over which the way is, so that the window cannot be stopped except by stopping the way,—could the way be stopped on the ground that a wrongful use is being made of the way? Impossible. Again, suppose the owner of the dominant tenement pulled down a blank wall on it, and thereby let in light to a part of the house on his side, and also thereby overlooked the servient tenement,—could the privileged windows then be obstructed? Suppose the wall fell down, or was blown down,—would the not rebuilding of it be a wrongful using of the privileged lights? Again, suppose a window nineteen years old, and a fresh one opened, and then a year elapsed, would the then twenty years old window have got a privilege, \*850] and, \*if so, a rightful or wrongful one? To my mind, the burthen of proving the right to stop the privileged window is on the defendant, and he has brought forward *nothing* to support his case. But I go further, and think reasons can be given why it should not be so. What additional burthen will the new window throw on the servient tenement, if, as is true, it cannot be obstructed unless the old windows are? The only thing that can be suggested, is, that the old windows might be given up; and then, unless the new window had become privileged, the lost proprietary right would revive, and so it is of importance to prevent the acquisition of a privilege to a new window. But the objection is simply fanciful. It is a case which in practice never did nor will happen; and it is infinitely more reasonable to hold that this power to open a new window which cannot be obstructed, is a rightful consequence of the possession of the old windows, rather than a wrongful use of them. Again, it is said, privacy may be interfered with by a new light. But, in answer to this, it is to be remembered that privacy is not a right. Intrusion on it is no wrong or cause of action. The proof (though none is needed) is this. If No. 1 and No. 2 in a street belong to different owners, and have privileged lights, and No. 2 opens new lights, which cannot be obstructed without obstructing those of No. 1, and so cannot be at all, and so will in twenty years become privileged, yet no action lies against the owner of No. 2, nor of No. 1. And this suggests to me, what a strange right is this that is claimed by the defendant. If the dominant owner has built to the edge of his land, and throws out a new light by the *side* of the old, the new light can and must be obstructed without obstructing the old. But, if the dominant owner has built some distance from his boundary, or if a street runs between \*851] \*him and the servient owner, and so the latter cannot obstruct the new lights by building close to them, then he may build at a distance, and obstruct both. Again, if, where the houses are differently owned, the new windows in one cannot be obstructed, because the privileged in the other would be, what difference can it make that the two houses belong to one owner? What if they do, and one is let for fifty years, and the tenant opens new windows, does this sup-

posed right then accrue to the servient owner? or does it on the expiration of the term? If the new windows are not then closed, does the owner make a wrongful use of the privileged windows of one house because he does not close those in the other which his tenant opened? It seems impossible to extend this doctrine to two adjoining houses: but, if not, why to two windows in one house? Can the rights of parties depend on whether the windows are in two houses thrown into one, or in one house divided into two, or not so thrown or divided? Further, why should the right to light acquired by twenty years' enjoyment be differently treated to one acquired by express grant? Suppose a grant by deed that a person might have a particular window,—an incorrect expression, because every man has a right to all the light he can get, without any grant, and could maintain an action against a mere wrongdoer: see per Cresswell, J., *Truscott v. The Merchant Taylors' Company*, 11 Exch. 864,—but, suppose such a grant, and a grant that the grantor would not build or do anything on his own land to obstruct it, and suppose the grantee opened a new window above it, could the grantor then say the right to the granted window was gone,—that the right to build on his land, which he had granted and covenanted not to do, was restored to him? Surely not. If he did, he must say there was some implied qualification or exception in his absolute grant, which \*could not be contended. Neither is there in the unqualified right given by the statute as the result of twenty years' enjoyment. In truth, the contention of the defendant is, to put a qualification and restriction not found in the statute on the right acquired according to that statute. And for this and for the general proposition of the defendant there really is no reason. No hardship is inflicted on the servient tenement, because, as I have said, if (as by the hypothesis) the owner of the servient tenement was by the right acquired by the privileged windows prevented building on or otherwise using his land so as to block the new window, the new window does not add to that burthen: if the old windows did not so prevent before the new window, neither do they after.

On these grounds, then, I think the plaintiff is entitled to our judgment, and of course I think that the law was not correctly laid down in *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83). In that case, however, the Court *supposed* that an additional burthen was imposed on the servient tenement by what had been done by the plaintiff: see the passage at p. 131, beginning with the word "Confessedly." How that could be there, I do not see. It certainly is not so in this case, though I cannot think it would make any difference if it were. Then *Blanchard v. Bridges*, 4 Ad. & E. 176 (E. C. L. R. 31), 5 N. & M. 567 (E. C. L. R. vol. 36), is relied on. In that case, however, the windows were all new and different; and certainly the alteration did add to the burthen on the servient tenement: and, with great respect, the reason there given, that, unless the right is limited to the identical windows, inconvenience will arise in the shape of difficult questions, is not satisfactory. It is true, as there said, no cause ought to be surmised other than one capable of producing the effect: but, if the consent of the owner of the land is to be \*inferred it ought to be a consent to such a burthen as the window imposes on him; [853

and then the question would be whether the burthen was altered. But I doubt, with great respect, if the consent of the owner of the dominant tenement is in question. It certainly is not under Lord Tenterden's Act; and the right might now (as the enjoyment need not be as of right) be gained, not only without the consent, but also without the knowledge of the servient owner. But, whatever may be the effect of these cases, they did not intend to overrule former decisions: see *Blanchard v. Bridges*, 4 Ad. & E. 176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36), the reference to *Chandler v. Thompson*, 3 Campb. 80, and in *Renshaw v. Bean*, 18 Q. B. 131 (E. C. L. R. vol. 83), the passage beginning "We by no means say." Indeed, both those passages are in favour of the now plaintiff, and in conformity with the current of authorities, which seems to me strongly so.

All the cases collected in *Gale on Easements*, p. 863, from *Cher- ington v. Abney*, 2 Vern. 646, to *Blanchard v. Bridges*, 4 Ad. & E. 176, 5 N. & M. 567, are in the plaintiff's favour. Then there is the case before the present Master of the Rolls, whose judgment seems to me law and excellent good sense, and in point,—*Cooper v. Hubback*, 31 Law J., Chan. 123. So also is the authority of *Comyns's Digest*, *Action on the Case for Nuisance*, citing *Vernon* 646. Here, and in all the other cases the question is, if the alteration is to the "inconvenience" of the servient owner. I think, therefore, that the authorities, as well as principle and convenience, are in favour of the plaintiff, that "the law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness subversive of common sense, nor into any extravagant looseness which would destroy private rights:" per Story, \*854] *J.*, *Gale on Easements*, p. 182. In truth, in these cases \*substantial rights and convenience are disregarded in the arguments for the defendants; and, under colour of protecting themselves from a fanciful addition to the burthen on them, the owners of the servient tenement claim to inflict grievous loss and injury on the owner of the dominant. If, as is said in *Renshaw v. Bean*, the right is a right to prevent the acquisition of a further privileged window, then our judgment here ought to be for the plaintiff; for, there is no pretence that what was done by the defendant was done with that object. The argument for the defendant is of a dog-in-the-manger character. The old windows may remain, to the inconvenience of the servient owner; but any improvement in them or addition to them, though no damage to the servient owner, is not to be allowed.

Upon the other question, I have a difficulty in making the hypothesis on which it depends, viz., that the defendant *might block* the old and new windows, because he could not block the latter without the former. Supposing that to be so, I should have thought, as a general rule, that, if a man had a right to do a thing when he did it, it could not become unlawful and actionable by the subsequent conduct of another. But it does seem to me in this case, that, if the owner of the dominant tenement has the right, in order to prevent the acquisition of a new privilege, to do what would otherwise be wrongful, the right to do that act must be coextensive with the reason for it, and ceases with that reason. On this point, it is necessary to be very precise in the language used. The defendant is not "com-

pelled" to do this by the "wrongful" act of the plaintiff. There is no "necessity." There is no usurpation by the plaintiff. Suppose the defendant has the *right*, it is no compulsion: he *may* do it or not, as he likes, and to guard against \*a mischief that may otherwise happen to him. It seems to me, therefore, that it is reasonable, [\*855 that, if he chooses so to do it, it must be subject to the obligation to remove it, where his justification for doing it is removed.

I therefore agree with Erle, C. J., and Williams, J., and on this ground also think the judgment should be affirmed.

CROMPTON, J.—In this case I am of opinion that the judgment of the Court below should be affirmed, for the reasons given in the judgments delivered by the Lord Chief Justice of the Court of Common Pleas and my Brother Williams.

I should have merely expressed my concurrence with the view taken of the case in those judgments, if I had not been aware that two of my learned Brothers who arrive at the same conclusion as myself, for affirming the judgment, do so wholly or partly on the ground that the case of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), is not law: and I therefore think that I ought to say that I am by no means prepared to agree with them as to the propriety of overruling that decision, though, in the view of the case which I take, it is not necessary for the decision of this case to express any positive judicial opinion upon the point.

The case of *Renshaw v. Bean* was one decided apparently after full argument and consideration by Lord Campbell and Justices Patteson, Coleridge, and Wightman. I should be sorry to disturb the law as laid down by such a judgment, without full argument and consideration, especially as there seems to be great reason for supporting it.

I understand the effect of *Renshaw v. Bean*, as explained by the Lord Chief Justice Erle and my Brother Williams, in the Court below, to be, that, where \*the owner of the dominant tenement has opened new lights in such a way as that the owner of the servient tenement cannot prevent the right to the new lights from being gained, as against him, without obstructing the old, he is allowed to obstruct and excused for obstructing the old lights *so long as and to such extent as* is necessary for him to do so in order to prevent the usurpation of the new lights. [\*856

It has been said, indeed, that the decision involved the principle of the destruction of the old right: and this is founded principally upon what the Court of Queen's Bench said as to the form of the pleadings, when they held that the defence was open under the traverse of the right to the light. This, however, may be explained either on the ground adverted to by my Brother Williams, that there was in that case a confusion of all the lights, so that none remained the same for the time, or upon the principle, that, on a traverse of the right, the question was whether, as between the plaintiff and defendant, the plaintiff had *at the time a right to have his old lights unobstructed*; as, in trover, on not guilty, the plaintiff may have the general property, though the special property of the defendant may entitle him to say, that, as between him and the defendant, the plaintiff had not a right to the possession and property at the time. Whether this was right

or wrong on the narrow question of pleading, the Court carefully guard themselves from deciding that the right was destroyed.

If the Court of Queen's Bench were wrong in holding that the owner of the servient tenement could not so protect himself, it must follow inevitably that the party who has acquired by the acquiescence or non-obstruction of his neighbour a right to light through a single pane of glass, may open as many windows as he likes in a case like \*857] the present, and the owner of the \*servient tenement can have no possible means of preventing the usurpation, as by the hypothesis the new lights cannot be obstructed without some interference with the old one.

The necessity of obstructing a new light at the penalty of having a right gained for them by non-obstruction for twenty years, arises from the very peculiar state of our law: and this peculiarity may be thought to make it almost necessary, from the very nature of the case, to hold that the owner of the servient tenement shall be allowed, according to the decision of the Court of Queen's Bench in *Renshaw v. Bean*, to do on his own land whatever is necessary to obstruct the usurpation attempted by the voluntary act of the owner of the dominant tenement.

The easement or right originally gained for the old light is a right or easement of the kind sometimes called, "*ne quid facias*;" that is, the owner of the servient tenement is under a restriction not to build on his own land so as to obstruct the light. And it may not be thought to be an unreasonable limitation on the obligation or engagement not to build on his own land, that, whilst he allows himself to come under a restriction not to build so as to obstruct a small light, he by no means obliges himself not to retain his remedy of doing what by the act of the dominant owner is made necessary to prevent the gaining of the other light. As far as the right depends on the acquiescence of himself or his tenants, it can hardly have been intended, by acquiescing in a small light, to prevent himself from building up to prevent the usurpation of lights opened, it may be, along the whole extent of his neighbour's building: and it may, perhaps, be thought competent for him to say,—"*I came under an obligation not to build on my own land as against the window to which* \*858] *you have acquired a right*;" \*but this must be taken with the qualification, that, if you make it necessary for me to build up, by your opening new lights, I must, from the very nature of the right, be allowed to build so as to prevent that usurpation, even though it may affect for the time your old light wholly or in part."

If this be not so, an acquiescence as to one window would, in cases like the present, operate as a grant of as many windows as the party chose to open,—a state of the law apparently not in accordance with the origin and limitation of the right to light through the accustomed apertures, as explained by Patten, J., in *Blanchard v. Bridges*, 4 Ad. & E. 176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36).

It has been said that the opening of the new lights by the owner of the dominant tenement on his own premises is not a wrongful act: but, as against the servient tenement, it is an act of usurpation only to be guarded against by the obstruction to be raised on the land of the servient tenant; and it may be thought that such a limitation to

or exception from the restriction of building upon a man's own land, may properly, and almost necessarily, be implied from the peculiar mode in which rights of this kind arise or are prevented from arising, and where the necessity of the building, as against the new lights, arises from the voluntary act of the owner of the dominant tenement, who puts his neighbour into the situation of having a right acquired against him if he does not build.

I am not, therefore, prepared to agree in overruling the case of *Renshaw v. Bean*: but I do not think that the existence of the right to build up in the owner of the servient tenement, whilst necessary so to do in order to prevent the gaining of the new light, operates as an abandonment or forfeiture of the old right; and I do not think that the evidence in the present case shows any intention to abandon the old right, within *the decided cases*. In order to make out [\*859 that the right has been destroyed in such cases, I think that a clear intention of permanently abandoning the old right should be manifested, according to the law as laid down by the Court of Queen's Bench in the case of *Stokoe v. Singers*, 8 Ellis & B. 31 (E. C. L. R. vol. 92).

If, according to the above view, the result is that the right is not gone, but that the owner of the servient tenement is by the personal act of the owner of the dominant tenement justified in keeping an obstruction *so long only and to such an extent only as is necessary to prevent the additional right being acquired against him*, he would not be justified in obstructing the old lights when the necessity for obstructing the new ones no longer existed. If there had been an intention manifested entirely and permanently to abandon, he would have had a right to raise a permanent building, and the old right would have been lost: but if, in a case where no such intention can be made out, he chooses to make a permanent building where he has the right of or excuse for making only a temporary obstruction, perhaps speculating on the chance of the owner not restoring the lights to their original state, it is his own fault.

It was much pressed upon us, that, the defendant having been justified originally in building as against the attempted usurpation, such building cannot become unlawful: but I think his justification extends no further than to allow him to obstruct *whilst the occasion for so doing remains*; and that, when the occasion ceases, and the lights are restored to their original state, he, as occupier of the land, is liable for keeping an obstruction to the lights of his neighbour.

I agree with the answer given by the Lord Chief Justice of the Common Pleas and my Brother Williams to the argument for the defendant in this respect.

\*In the result, I come to the conclusion, that, whether *Renshaw v. Bean* was well or ill decided, the judgment of the [\*860 Court below ought to be affirmed. If, as some of my Brothers think,—but in which opinion I am by no means prepared to concur with them, as at present advised, and as to which I wish to be considered as giving no judgment,—that decision is wrong, of course the plaintiff is entitled to recover. But, assuming for the present purpose that the case of *Renshaw v. Bean* was well decided, I think that the right was not gone, as I find no intention to abandon it permanently. And I think that

the right to obstruct or excuse for obstructing was only temporary, and did not exist for a longer time or to a greater extent than was necessary for preventing the usurpation of the new light; and, as such necessity no longer existed, I think that the defendant was liable for obstructing after such necessity had ceased, and consequently that the judgment of the Court below should be affirmed.

WIGHTMAN, J.—I agree in the judgment of my Brother Crompton, for the reasons given by him, as well as for those given by the Lord Chief Justice and my Brother Williams in the Court below; and I think it unnecessary to add any reasons of my own, as they would be to the same effect. I agree entirely with them in the mode in which they have dealt with and explained the decision of the Court of Queen's Bench in *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83).

MARTIN, B.—I had written a judgment upon this case, in favour of the defendant below; but it has been lost or mislaid. I therefore have to state that I concur with the Lord Chief Baron.

\*861] Mr. *Cleasby*, on behalf of the appellant, made three \*points; the first was, that the case of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), which was afterwards affirmed in the Court of Exchequer Chamber, in *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. 99), was wrongly decided: and I understand that to be the opinion of my Brothers Bramwell and Blackburn, whose judgments I have read. I, however, think that case was rightly decided; and, at all events, I consider that I am bound by the decision of the Court of Exchequer Chamber.

The second point made by Mr. *Cleasby* was, that there was in this case no sufficient evidence of abandonment, and that the old right remained. On this point, I decline to give an opinion. It depends upon an inference to be drawn from the intentions, the motives, and the acts of the plaintiff; and I think that such inference ought to be found by a jury properly directed, and not by the Judges sitting in the Exchequer Chamber. It is not the duty of the Judges to draw inferences of fact; nor is the Judge who tries a cause to direct the jury what inferences of fact they ought to draw, or to draw conclusions from the facts himself.

On the third point, I am of opinion that this action is not maintainable. The facts of the case are these:—The plaintiff thought fit to build and increase the height of his house, and open windows in the heightened part. Upon this being done, the defendant built a wall for the purpose of preventing the plaintiff obtaining a right of light; and it is found in the case, that this wall was properly erected, was the most convenient thing to be done, and that the whole proceeding on the part of the defendant was right; and that it was done by him after communication and correspondence being had with the plaintiff. The result was, that the plaintiff blocked up his new lights, but allowed \*862] the heightened building to remain, and he \*then called upon the defendant to remove the wall which he had built; and, substantially, this action is brought for not taking this wall down, which of necessity would cause expense to the defendant. I think it is an abuse of language to call the non-removal of the wall a continuance of the wall of the defendant. All that the defendant did, he had done under the alleged authority of the decision of a Court of law,

that what he did was lawful. Mr. *Cleasby's* principal argument was, that it was a great hardship on the plaintiff that he should lose his light, that is, the light of his ancient window, which was affected by the wall erected by the defendant. For my own part, I do not at all regret that a man having a house in the city of London, who increases the height of his building, and thereby compels his neighbour to build up a wall at an expense in order to protect himself, is found to be in difficulties from having so done. Persons being occasionally subject to such difficulties, may possibly prevent the doing of aggressive acts against neighbours, which the plaintiff seems to me to have done in this case. In the absence of any authority, it would seem to me to be wrong to cast the expense of removing this wall on the defendant; and I am of opinion that this action is not maintainable.

The view put by my Brother Crompton, is, that the building of the wall was an excusable act, and the excuse only existed so long as the new windows were continued. It seems to me difficult to draw a distinction between an excusable act and a lawful act; and I am content to take it that the plaintiff was sincere when he blocked up his windows: but, after the defendant had taken down his wall, he might open them the following day; and I know no means of preventing his doing so, or preventing his acquiring a right of light against the defendant, except by the latter rebuilding the wall: and, with [\*863 great deference to the opinions of others who differ from me, I am of opinion that this action is not maintainable, on the grounds I have stated. In my opinion, the defendant has not been proved to have done an unlawful act, or omitted any duty which the law imposed upon him.

POLLOCK, C. B.—In this special case the plaintiff sued the defendant for obstructing lights alleged to be so ancient as to entitle the plaintiff to claim a right to them. At the trial, it was arranged that a special case should be drawn, and it was referred to an arbitrator to prepare the case. The special case, instead of finding facts, which a special case, like a special verdict, ought to do, and facts only, has laid before us a great deal of evidence, leaving us to find the facts for ourselves, and possibly to differ as to what are the real facts of the case on which we are to decide in point of law; the result of which may be that the judgment of the Court shall depend, not on any point of law (as to which all the members of the Court may be unanimous), but on some mere question of fact, as to which the Court may be divided. The impropriety of this is pointed out in *Jenkins's* 6th Century, Case 4, p. 232, where it was held by all the Judges that the jury ought to find whatever was *matter of fact*, and give a positive verdict, and not merely find the circumstances specially.

The authority of the law is much impaired by differences of opinion among the Judges. But, as the law is a practical and not a pure science, it is almost impossible to avoid occasional differences of opinion among those whose duty it is to decide the questions of law which arise out of the complicated transactions of commercial and social life: but a difference of opinion on questions of fact would be still more \*unfortunate; and I think Judges ought not to be called upon [\*864 to exercise the functions of a jury, by having the evidence laid before them from which to find the facts, though it may be reasonable

that they should have power to draw any inference that is clear and manifest, and which has been omitted in framing the case.

I shall decline to draw any conclusion of fact from the correspondence of the parties and their solicitors, and the other evidence which is set out at great length: but I shall not shrink from stating my opinion on the points of law which appear to me to belong to this case.

If by grant or user a party has acquired a right to have certain lights unobstructed, his right is limited to what has been granted or acquired by user. He may, indeed, abandon any portion of what has been granted or used: but he cannot enlarge it, increase it, or change the mode in which it has been enjoyed; I think it was well decided by the Court of Queen's Bench in *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), that, if a person having a right to lights opens new lights, the new lights may be obstructed; and, if they cannot be obstructed without also obstructing the old lights, then the old lights also may be obstructed; and the party entitled to them has no one but himself to blame for this inconvenience.

If a man entitled by grant or user to certain lights pulls his house down and rebuilds it, with a total disregard of his former limited grant or user, I think his neighbour is entitled to consider this as an abandonment of the limited grant or user, and a claim to exercise and enjoy a greater right than had been granted or used before; and I think he may therefore obstruct the excess claimed: and, if the claim be made by erecting a permanent building, the neighbour may oppose \*865] a permanent obstruction. If, then, the party \*entitled to light, perceiving his error, pulls down his new house, and restores the building as it was before, with such lights only as had been granted or used, I think he cannot maintain an action simply because his neighbour does not thereupon pull down the obstruction. He himself was the cause of what the defendant has done. The obstruction was lawful when erected; and it seems to me contrary to justice, and to all the analogies which the law of England furnishes, that a matter which was lawfully erected shall become unlawful at the option and by the act of the party whose encroachment gave rise to and justified it.

It is not necessary to decide whether by any act, such as a tender of expenses, the plaintiff may maintain an action, or whether he may in certain cases peaceably remove the obstruction. No such question arises in this case; and I therefore forbear to discuss it: but I think the plaintiff cannot maintain an action because the defendant does not pull down an obstruction which the conduct of the plaintiff made it lawful for the defendant to erect. Judgment affirmed.(a)

(a) A writ of error is now pending in Parliament.

\*866]

#### \*MEMORANDUM.

THE following cases reported in this volume have since been heard and disposed of, on appeal on error, in the Exchequer Chamber:—

ALLEN v. SMITH, p. 638,—judgment affirmed.

BLADES v. HIGGS, p. 501,—judgment affirmed.

NEWTON v. CUBITT, p. 32,—judgment affirmed.

# ADDITIONAL CASES

FROM

## CONTEMPORANEOUS REPORTS.

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### RAYSON v. ADCOCK. *Feb. 5.(a)*

A mortgagee of copyhold premises, who has not been admitted by the lord of the manor, cannot maintain ejectment against the tenant of the mortgagor, unless the relation of landlord and tenant shall have been established aliunde.

THIS was an action of ejectment, brought to recover certain copyhold premises in the manor of Rushden, in the county of Northampton, and was tried before the Lord Chief Baron, at the last Assizes. The plaintiff was the mortgagee of the premises in question, which were conditionally surrendered to her in December, 1858, a deed of covenant having been drawn up at the same time in the usual way. Previous to, and at the time of, the mortgage, the defendant was tenant to the mortgagor. The plaintiff was never admitted by the lord of the manor, and there was no evidence that the defendant had ever paid rent to the plaintiff, or had attorned to her. It appeared, however, from the evidence in the cause, that the defendant knew of the existence of the mortgage. It was objected at the trial, that the plaintiff never having been admitted, had not the legal estate, and therefore could not maintain ejectment; moreover, that the defendant still held as tenant, and was therefore entitled to notice to quit. In answer to the second objection, a document, which was in the form of a notice from the defendant, and served on a third party, alleging a right in himself to the premises, was put in evidence, and relied upon as amounting to a disclaimer. The Lord Chief Baron directed a verdict for the plaintiff, but gave the defendant leave to move on the grounds—first, whether the plaintiff had title to maintain ejectment before admittance; secondly, whether the notice in question amounted to a disclaimer. A rule having been obtained accordingly,

*Sills* showed cause.—As to the first point, the defendant is tenant to the plaintiff, and is therefore estopped from disputing the plaintiff's title. The evidence is, that before the mortgage the defendant was tenant to the mortgagor; then, on notice of the mortgage, he became the tenant of the plaintiff. [BYLES, J.—But here there was no legal mortgage. The plaintiff's title was not perfected until admittance.

At present you have shown nothing more than an equitable mortgage.] It is submitted that sufficient has been done to create a tenancy. The mortgagor has assigned all his interest to the plaintiff, and can no more dispute the title of the plaintiff than of the mortgagor: *Rennie v. Robinson*, 1 Bing. 147 (E. C. L. R. vol. 8). [WILLIAMS, J.—But there the lessor of the plaintiff never had a better title than that which he conveyed away. Here the legal estate is still in the mortgagor.] The mortgagor has conveyed all that he can to the plaintiff. The plaintiff can at any moment perfect her title without the privity or consent of the mortgagor, and when the plaintiff is admitted, the legal estate will vest in her from the date of the surrender, and not from the date of the admittance. [BYLES, J.—No doubt that admittance immediately before the trial would have been sufficient.]

[The judgment of the Court renders the argument on the second point unnecessary.]

*Willes*, in support of the rule.—The defendant is not disputing the plaintiff's title; he merely says that the plaintiff must show that he stands in the shoes of the mortgagor for all purposes to which the legal estate is necessary: there can be no estate before admittance: *Doe d. Tofield v. Tofield*, 11 East 246; *Cole on Eject.* 622.

WILLIAMS, J.—I am of opinion that this rule should be made absolute. The plaintiff, as mortgagee, has brought her action against the defendant, who was let in as tenant to the mortgagor before the date of the mortgage. The first question is, whether the plaintiff can have a right of action under the assignment from the mortgagor? Now, no perfect title has been shown in the plaintiff as assignee of the mortgagor, for there has been no admittance of the plaintiff upon the surrender of 1858. It is not contended that the plaintiff has really anything more than an equitable estate. This being so, it is nevertheless said that the defendant is estopped from disputing the plaintiff's title, because the mortgagor has assigned all his interest to the mortgagee, who stands, therefore, as the plaintiff contends, in the shoes of the mortgagor. The plaintiff is not in that situation, because whatever the assignment may purport to create, it conveys but an equitable estate, on which no estoppel can operate. The plaintiff cannot, therefore, bring ejectment against the defendant. As to the second point, if the plaintiff were the assignee of the reversion, the question raised as to the disclaimer might become material; but the opinions expressed upon the first, renders it unnecessary to say anything on the second.

BYLES, J.—The premises in this case are copyhold. The plaintiff says, she is assignee of the reversion, and as such brings her action of ejectment against the defendant, tenant of the mortgagor. The plaintiff must therefore show, that upon the surrender to her in 1858, she has been admitted. Until that has been done, the assignee of the mortgagor has not, in equity, the legal estate, and in a Court of law she is a mere stranger. She has not been admitted; she must therefore show, aliunde, that the relation of landlord and tenant exists as by express contract. That has not been done, and the plaintiff having thus no right of action, the rule must be made absolute.

KEATING, J., concurred.

Rule absoluta.

EX PARTE EDWARDS. *May 1.(a)*

C., an article clerk, who, before entering into his articles, was promised a sum of 100*l.* to be articleed, was advised by the person through whom the sum was payable, to article himself, as he should probably obtain the money within six weeks. On the faith of this promise, C. articleed himself to an attorney, but the 100*l.* was not paid, and he was unable to obtain that sum from other sources till twelve months afterwards, when, on payment of the duty and penalty, his articles were stamped. The Court, on these facts, refused an application to allow the articles to be enrolled, and the service to date from the time of execution.

*Ex parte Herbert*, 8 Jur. N. S. 615, commented on.

THIS was an application on behalf of one Edwards, an article clerk to an attorney, for a rule to allow his articles of clerkship to be enrolled, and the service thereunder to count from the execution thereof.

The affidavit states, that the applicant was in the office of his father, an attorney of this Court, from June, 1856, to September, 1860, when the father, from adverse circumstances, gave up business, without being able to article his son; that in the latter year the father and son executed a mortgage of certain property to a client of one Poole, an attorney, for securing 500*l.* and interest, and to a share of this property the applicant was entitled in reversion; that the mortgagee having advanced only 400*l.*, it was arranged that the remaining 100*l.* should be advanced shortly afterwards, and that the father promised the son that he should be articleed out of the 100*l.* as soon as it should be procured; that after repeated applications to Poole to obtain the 100*l.* in order that the articles might be executed, Poole, on a certain day, told the applicant that he had better article himself, as "he should probably obtain the money in a month or six weeks," and he "knew that the articles could be stamped within a few months after they were executed;" that, acting on this advice, applicant articleed himself in November, 1861, to one Leake, an attorney, but that afterwards Poole stated that his client had declined to make the advance of the 100*l.*; that in the month of February of this year he had succeeded in borrowing 100*l.*, with which his articles had been stamped, and that he had acted on the advice of Poole in the above matter, because he knew he was entitled to the 100*l.* as soon as it should be advanced. The articles were stamped twelve months after their execution on payment of the duty, and 20*l.* penalty, the applicant having memorialized the Lords of the Treasury for that purpose. Both the father and son denied that there was any intention to defraud the revenue.

*Hayes*, Serjt., for the appellant, contended, that the present application was made under circumstances similar to those in *Ex parte Bishop*, 9 C. B. N. S. 150, 7 Jur. N. S. 243, *Ex parte Herbert*, 81 L. J., Q. B. 33, 8 Jur. N. S. 615, and *Ex parte Bredon*, 31 L. J., C. P. 321, 8 Jur. N. S. 937, 9 Jur. N. S. 176, where, as in this case, the applicants were prevented by unforeseen emergencies from paying the duty within the proper time. In *Ex parte Herbert*, the judgment of Cockburn, C. J., is to the effect, that the stat. 19 & 20 Vict. c. 83, s. 3, allowing the Treasury to stamp the articles after six months, has altered the duty of the Courts in this matter.

ERLE, C. J.—I am of opinion that this rule should be refused. The principle by which we ought to be guided is stated in *Ex parte Bredon* as follows:—"The legislature has required the Courts to see that many conditions intended to secure skill and respectability in attorneys have been complied with; amongst others, indirectly, that the stamp duty on the articles of clerkship has been paid. As to this payment, the Treasury has a direct duty in respect of the revenue; but beyond that, the Judges have a duty to see, either that the money has been paid in due time, or the delay accounted for, before they allow the enrolment, and order the service to count as above mentioned." It has been the practice, during all the time I have had the honour to sit in the Court of Queen's Bench and in this Court, to grant applications of this kind, where the party applying had, at the time of entering into his articles, good reason to believe that the money would be forthcoming at the proper time, and where the non-payment has arisen from unforeseen circumstances. This was the ground of the decision in *Ex parte Bredon*. The case made out was a very strong one; the promise which had been made, but not kept, was a promise the party had, under the circumstances, a right to expect would have been fulfilled. In *Ex parte Bishop*, the Court were about to refuse the application, when it appeared that the matter had been before my Brother Willes at chambers, who told the applicant, that on payment of duty and penalty he could be admitted; and it was on the ground that the applicant had been so informed, that the Court considered that they were bound to admit him. In *Ex parte Herbert* it is laid down by the majority of the Court, that the recent statutes, giving the Treasury a discretionary power to stamp the articles after the proper time for doing so has elapsed, rendered it a mere question of revenue, and that if the Treasury are satisfied, we have no option but to allow the enrolment of the articles nunc pro tunc. The stat. 19 & 20 Vict. c. 81, has altered the matter as regards the revenue, but no statute has been passed by which we are declared to be merely ministerial officers, to see that the duty has been paid. I do not concur, therefore, in that part of the judgment in *Ex parte Herbert*. The applicant in this case had not, at the time when he executed his articles, any reasonable expectation that the money would be paid within the six months, and, therefore, there was no unforeseen emergency entitling him to have his application granted.

WILLES, BYLES, and KEATING, JJ., concurred.

Application refused.

# AN INDEX

TO .

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### ACCEPTANCE.

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### ANCIENT FOUNDATIONS.

See ANCIENT LIGHTS, 2.

### ANCIENT LIGHTS.

*Prescriptive Claim for*, under 2 & 3 W. 4, c. 71.

1. To a declaration for obstructing ancient lights, the defendant pleaded the custom of London to build on ancient foundations to any height; that the defendant was possessed of an ancient messuage adjoining the plaintiffs' premises, and towards which the windows in the declaration mentioned looked; and that, pursuant to the custom, he built thereon, and thereby unavoidably a little obscured the plaintiffs' windows.

To this plea the plaintiffs replied, that the access of light and air to the windows in question had been enjoyed as of right and without interruption by the respective occupiers of the plaintiffs' messuage for and during the full period of twenty years before the said obstruction, and for and during the full period of twenty years next before the

commencement of a suit (or action) wherein the plaintiffs' claim in this action, and to the said access and use of light and air, was and is brought into question :—

Held,—Williams, J., dissenting,—that the twenty years' enjoyment of the access and use of light to a dwelling-house, &c., under the 3d and 4th sections of the Prescription Act, 2 & 3 W. 4, c. 71, is to be taken to be the period next before some action or suit wherein the claim shall have been brought in question, and, consequently, that the replication was good. *Cooper v. Hubbuck*, 456

2. The custom to rebuild to any height upon ancient foundations in the city of London, is destroyed by the Prescription Act, 2. 3. *Id.*

#### *Right to Obstruct.*

3. A., being possessed of a house of three stories, in Wood Street, Cheapside, with a window in each story, lowered and enlarged the windows on the first and second floors, and added two new stories to the building, with windows therein. The altered windows on the first and second floors each occupied in part the space before occupied by the ancient windows: the window on the third floor remained as it had always been. B., in rebuilding his premises opposite, obstructed the whole of the windows of A.'s house,—it being impossible (as found in a special case) to obstruct the new lights without at the same time obstructing the old ones. A. thereupon stopped up his new windows, and restored the old ones to their original state, and then required B. to remove the obstruction, which he refused to do :—

Held, by Bramwell, B., and Blackburn, J., that the original obstruction was not justifiable,—converting the principle laid down in *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 82), and adopted in *Hutchinson v. Copestake*, 9 C. B. N. S. (E. C. L. R. vol. 99).

Held by Wightman, J., and Crompton, J., that the original obstruction was justifiable, but that the defendant was bound to remove it upon the abandonment by the plaintiff of the usurped lights.

Held, by Pollock, C. B., and Martin, B., that, the original obstruction being lawful at the time of its erection, its continuance was not unlawful.

The judgment of the Court of Common Pleas was consequently affirmed. *Jones v. Tapling*, 826

### APPEAL.

An appeal from the Consistory Court to the Court of Arches is no bar to an application for a prohibition. *White v. Steele*, 383

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### APPRENTICE.

#### *Apprenticeship under a Local Act.*

1. By a local Act of 1 G. 2, c. xx., certain revenues were vested in the guardians of the poor of Canterbury, in trust for the maintenance and employment of the poor of that city: and the guardians were required to give bond under their common seal, for themselves and their successors, for ever thereafter to provide for, clothe, and maintain sixteen poor boys of the said city, to be called Bluecoat Boys, and cause the said sixteen boys to be instructed, &c., and put them and every of them respectively out apprentices after they and every of them respectively should have attained their respective ages of thirteen years, and before their said ages of fifteen years, &c.:—Held, that this gave the guardians no authority to apprentice the boys against their will, or after the age of fifteen. *St. Nicholas, Rochester (Churchwardens), App., St. Botolph-without-Rishopsgate (Overseers), Resp.*, 646
2. Where, therefore, a boy was apprenticed by the guardians at seventeen, but did not execute the indenture,—Held, that the indenture was invalid, and that a service by the apprentice under it conferred on him no settlement. *Id.*

### ARCHDEACONRY COURT.

#### *Fees of.*

1. A claim for fees of office,—*ex. gr.* fees of the registrar of an Archdeaconry Court,—to be valid, must be founded upon immemorial usage. *Shephard v. Payne*, 414
2. The office of registrar of an Archdeaconry Court, being a freehold office, with duties of a continuous and presumably per-

petual character, and one whose existence is essential to the due exercise of the functions of the archdeacon, is an office to which fees may be annexed by immemorial usage. *Shephard v. Payne*, 414

3. The fact of such fees having been paid and received from the year 1727 down to the present time, is evidence from which the immemorial receipt of them ought to be presumed, if they could have had a legal origin; and the fact of their amount having from time to time been varied, does not necessarily affect their validity. *Id.*
4. In considering the reasonableness of such fees, regard may be had to the amounts established by statute for similar services rendered by other officers, and to the fees formerly paid in the Courts of Westminster Hall and at the Assizes. *Id.*
5. It is only in respect of services rendered, or which the officer is ready and willing to perform, that such a claim can be substantiated. *Id.*
6. The archdeacon's visitation operating for the benefit of the parish at large, and, among others, of the churchwardens themselves, the performance of whose duties is facilitated by the services of the registrar, the fees payable to that officer are properly chargeable upon the churchwardens. *Id.*
7. For three centuries the practice of the archdeacons had been, in order to avoid expense, instead of visiting each parish in the archdeaconry separately, to divide the archdeaconry into districts, and to hold the visitation for all the parishes of that district at some one parish church within the district:—Held, that a visitation so held was not open to objection in a temporal Court. *Id.*

### ARCHES, COURT OF.

#### *See PROHIBITION.*

### ARTICLES.

#### *See ATTORNEY, 1, 2.*

### ATTORNEY.

#### *Service under Articles.*

1. *Enrolment nunc pro tunc.*—The Court will permit the service under unstamped articles of clerkship to be reckoned from their date, where the omission to pay the duty at the proper time was the result of an emergency which may be justly inferred to have been unforeseen by the party,—the stamp having been since affixed under the authority of the Commissioners of the Treasury. *In re Mathew Breden*, 351
2. B. had been managing clerk to an attorney, who died, leaving a widow and a son too young to carry on the business. He gave his services to the family and to a friend of the family (an attorney), in order to keep the

business together until the son should be admitted. The son, as soon as he was admitted (in June, 1858), gave him his articles, and the widow promised to pay the stamp-duty, as a reward for the great service he had rendered the family. Trusting to the widow's promise, he continued to serve under the articles; and he did not discover that the money had not been paid until after the expiration of the six months allowed by the statute (6 & 7 Vict. c. 73, s. 8) for filing the affidavit and enrolling the articles. In January, 1862, he petitioned the Lords of the Treasury (having then procured the money himself), who allowed the articles to be stamped on payment of the duty and the penalty under the 19 & 20 Vict. c. 81, s. 3:—The Court, under the circumstances, and after conferring with the Court of Queen's Bench, permitted the affidavit of the execution of the articles to be filed and the articles to be enrolled *nunc pro tunc*, and the service under the articles to count from the date of their execution. *In re Matthew Braden*, 351

#### Uncertificated.

3. An objection that an attorney is not duly certificated should be taken before the master. *Fullalove v. Parker*, 246
4. If made the subject of an application to the Court, it should at least be shown clearly that the party could not by the exercise of reasonable diligence have ascertained the fact in time to bring it to the master's attention. *Id.*

#### Striking off the Roll.

5. Practice on a rule calling upon an attorney to answer the matters. *In re Wright*, 705
6. It is no answer to such an application, that the applicant has already filed a bill in equity against the attorney for an account in reference to the transactions complained of,—even though the proceedings in equity have resulted in a decree against the attorney. *Id.*
7. Where it has been referred to the master to examine into the charges and to report to the Court, it is not competent to the counsel for the accused to go into the evidence given before the master: the Court will only look to his report. *Id.*

#### Articled Clerk.

8. C., an articled clerk, who, before entering into his articles, was promised a sum of 100*l.* to be articled, was advised by the person through whom the sum was payable, to article himself, as he should probably obtain the money within six weeks. On the faith of this promise, C. articled himself to an attorney, but the 100*l.* was not paid, and he was unable to obtain that sum from other sources till twelve months afterwards, when, on payment of the duty and penalty, his articles were stamped. The Court, on these

facts, refused an application to allow the articles to be enrolled, and the service to date from the time of execution.

Ex parte Herbert, 8 Jur. N. S. 615, commented on. *Ex parte Edwards*, 869]

#### BAILLEE.

See RAILWAY COMPANY, 3.

#### BANKRUPT.

##### What passes to the Assignees.

1. *Order and disposition.*—W., a trader, by bill of sale, dated the 14th of July, 1856, assigned all his stock and household furniture to the plaintiff as security for an advance of 100*l.* The deed contained a proviso, that, in case W., his executors, &c., should pay to the plaintiff, his executors, &c., the 100*l.* on the 14th of July, 1866, or at such earlier day or time as the plaintiff, his executors, &c., should appoint for payment thereof in and by a notice in writing given to W., his executors, &c., twenty-four hours before the day or time so to be appointed for payment as aforesaid, and should in the mean time pay the interest half-yearly to the plaintiff, his executors, &c., the deed should cease and be void. There was also a covenant by W. for payment of the 100*l.* and interest; and, a further proviso, that, until default should have been made in payment of the 100*l.* at the day appointed for payment, or of the interest, after notice, it should be lawful for W., his executors, &c., to hold, make use of, and possess the goods assigned, without any hindrance or disturbance by the plaintiff, his executors, &c. W. continued in possession of the goods until the 19th of January, 1862, when he committed an act of bankruptcy. On the 21st, the plaintiff left at his dwelling-house a notice in writing requiring payment of the 100*l.* and interest on the 23d. On the 22d, W. was adjudicated a bankrupt, and on the same day the messenger entered and took possession of the goods:—Held, that the goods passed to the assignees of W., as goods in his possession, order, and disposition, at the time of the bankruptcy, with the consent of the true owner, within the 125th section of the 12 & 13 Vict. c. 106. *Spackman v. Miller*, 659

##### Debts provable.

2. A declaration on a contract assigned for breaches,—first, that the defendant failed to replace certain amounts of preferential stock in a railway company,—secondly, that he failed to pay the plaintiff the dividends which became due upon such stock,—thirdly, that he failed to indemnify the plaintiff against calls made on certain mining shares assigned by him to the plaintiff as a security for the replacement of the stock above mentioned, which calls had been made and paid by the plaintiff. The defendant pleaded his

bankruptcy, and that the causes of action accrued before that event:—Held, that the plaintiff's claim in respect of the failure to replace the stock was a debt or demand provable under the 165th section of the 13 & 13 Vict. c. 106; but not as a liability to pay a debt or sum of money on a contingency, within the 177th or 178th sections. *Bettelley v. Stainesby*, 477

## BATHS AND WASHHOUSES.

*See SHUT-OFF*, 1.

## BILL OF EXCHANGE.

*Acceptance per Procurator.*

Where a bill upon the face of it purports to be accepted "per procurator," that circumstance is a notice to whoever takes the bill that the acceptor has but a limited authority; and the holder cannot maintain an action against the principal if the authority has been exceeded. *Stagg v. Elliott*, 373

## BILL OF LADING.

*See SHIPPING*, 1.

## BILL OF SALE.

*Filing with Affidavit.*

1. The description of the residence and occupation of the person making or giving a bill of sale, required by the statute 17 & 18 Vict. c. 36 to be contained in the affidavit filed with the bill of sale, must be that which fits the party at the time of giving the security, and not at the time of filing it. *The London and Westminster Loan and Discount Company v. Chase*, 730
2. An uncertificated bankrupt, following no occupation at the time of granting the bill of sale, may properly be described in the affidavit as a "gentleman," although at the time of filing the affidavit he carries on the business of a commission agent. *Id.*

*And see BANKRUPT.*

## BLEACHING WORKS.

*See FACTORY ACTS*, 1, 2, 3.

## BOARD OF WORKS.

*Liability of Contractor for Works done under the Local Management Act.*

1. A public body, though acting gratuitously for the benefit of the public, is responsible for damage resulting from the negligent performance of the duty intrusted to it. *Clothier v. Webster*, 790
2. The 135th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, empowers the Board of Works to make a sewer, and to carry their works through or under any cellar or vault under the carriageway or pavement of any street, &c., making

compensation for any damage done thereby; and by s. 225 a special mode of ascertaining the amount of damage sustained is pointed out:—Held, that these provisions did not preclude one who had sustained damage from work done by a contractor under the orders of the board, from maintaining an action against the contractor, where the damage had arisen from his negligence and want of care and skill. *Clothier v. Webster*, 790

## BURIAL-GROUND.

*See PROHIBITION.*

## CARRIERS.

*See RAILWAY COMPANY.*

## CERTIFICATE.

*See ATTORNEY.*

## CHARTER-PARTY.

*See SHIPPING*, 2.

## CHURCH.

*Repairs of*,—*see CHURCH-RATE.*

## CHURCH BUILDING ACTS.

*See CHURCH-RATE.*  
*PROHIBITION.*

## CHURCH-RATE.

*Validity of.*

In a district constituted under the provisions of the Church Building Act, 58 G. 3, c. 45, and assigned to a church built under that Act, it is competent to the churchwardens and inhabitants to make a rate not merely for the repair of the edifice, but also for the expenses necessary for the performance of Divine service therein. *The Queen v. The Official Principal of the Consistory Court of London, Ex parte Beall*, 220

## CLERKSHIP.

*Enrolment of Articles*,—*see ATTORNEY*, 1.

## CLOAK-ROOM.

*Liability of Railway Company for Articles deposited at*,—*see RAILWAY COMPANY*, 3.

## COMMON CARRIERS.

*See RAILWAY COMPANY.*

## COMMON LAW PROCEDURE ACT, 1852,

*Section 51.—Interrogatories.*

*See INTERROGATORIES.*  
*PRACTICE*, 3-8.

## COMMON LAW PROCEDURE ACT, 1854.

*Section 18.—Leave to proceed.*

*See PRACTICE*, 1.

## CONSISTORY COURT.

*See PROHIBITION.*

CONTRACT.

Construction of.

- A. contracted to sell to B. a specific cargo of wheat, described in the bought and sold note as "shipped per Diletta Mimbella, as per bill of lading dated September or October :"—Held, that this did not amount to a condition, so as to entitle the buyer to rescind the contract on its turning out that the wheat was not shipped at the time mentioned. *Gattorno v. Adams*, 560

CONTRACTOR.

See BOARD OF WORKS.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

COPYHOLD.

Custom to fell Timber other than for Repairs.

1. A custom for copyhold tenants to fell timber or other trees upon their customary lands, and to retain the same for their own use, without license from the lord, although such timber may not be felled for necessary repairs, is not unreasonable. *Blewett, app., Jenkins, resp.*, 16
2. And such a custom is not the less admissible in evidence, because it also professes to entitle the customary tenants to plough up meadow land and to suffer their houses to decay,—which might be a bad custom, if pleaded. *Id.*

Corn-Rent.

3. Election.]—Where the customary tenants hold under a corn-rent or an annual sum of money in lieu thereof, in the absence of a custom to the contrary, the election is with the tenant to pay either in money or in corn. *Blewett, app., Jenkins, resp.*, 16
4. Where, therefore, the assistant commissioner, under the Copyhold Acts, upon evidence that for sixty years past the payments had invariably been made in money, decided that the election was with the tenant,—the Court, upon a case stated by way of appeal, affirmed his decision. *Id.*

[Mortgage—Ejectment.

5. A mortgagee of copyhold premises, who has not been admitted by the lord of the manor, cannot maintain ejectment against the tenant of the mortgagor, unless the relation of landlord and tenant shall have been established aliunde. *Rayson v. Adcock*, 867]

CORN-RENT.

See COPYHOLD, 3, 4.

COSTS.

Taxation of.

1. Length of brief.]—In an action against a railway Company for an injury resulting

from the negligence of the Company's servants, the Court directed that the costs of copying into the plaintiff's briefs the evidence given at an inquest held upon the bodies of other persons who had been killed on the same occasion should be disallowed. *Lockstone v. The London, Brighton, and South Coast Railway Company*, 243

2. Number of counsel, and their fees.]—The number of counsel to be allowed, and the amount of their fees, is in the (almost uncontrolled) discretion of the master. *Id.*

Of Appeals against Decisions of Justices.

3. The Court will not give the respondent costs on dismissing an appeal against a decision of justices, where the question is a fairly arguable one. *Carwell, app., Cook, resp.*, 242
- Nor will they listen to an application for that purpose in the term after the decision. *Id.*

COUNSEL'S FEES.

See COSTS, 2.

CUSTOM.

See COPYHOLD.

CUSTOM OF LONDON.

See LONDON.

DAMAGES.

See NEW TRIAL.

DEPARTURE.

See PLEADING.

DEVISE.

Construction of.

1. Testator, by a will made subsequently to the 7 W. 4 & 1 Vict. c. 26, after directing that his debts and funeral and testamentary expenses should be paid by his executors as soon as conveniently might be after his decease, devised all his real and personal estate to trustees (whom he afterwards appointed his executors), in trust to pay the rents and proceeds thereof to his son J. S. for his natural life; and, from and after the death of J. S., in trust for the right heirs of him the said J. S. for ever :—Held, that, by reason of the direction to them to pay debts, the trustees took the legal estate in fee, and therefore, inasmuch as the estate for life and the estate in remainder were both equitable estates, the rule in *Shelly's Case* applied, and J. S. took an equitable estate in fee. *Spence v. Spence*, 199
2. A. by his will devised an estate called the Clerk Hill estate to his first son, James, for life, remainder to his first and other sons in tail male, with like remainders to his (the testator's) second and third sons Robert and John for life, and their sons,—remainder to the sons of James in tail general, with like

remainders to the sons of Robert and John,—remainder to the daughters of James in tail male, with like remainders to the daughters of Robert and John,—remainder to the daughters of James in tail general, with like remainders to the daughters of Robert and John,—remainder to the testator's daughter Elizabeth for life, with remainder to her sons in tail male,—remainder to his second and third daughters and their sons in tail male,—remainder over to the testator's own right heirs.

By a shifting clause,—reciting that by the will of Sir W. Gardiner certain estates were limited in trust for the testator's brother J. W. for life, with remainder to his first and other sons in tail male, with remainder to himself (the testator) for life, with remainder to his first and other sons in tail male, with divers remainders over in favour of his issue; and that it was his will and mind that the Clerk Hill estate should not be enjoyed, so long as he might legally thereby prevent it, consistent with the limitations theretofore mentioned in other respects, and before the ultimate remainder or reversion thereinbefore directed to be limited should take place and come into actual possession, by any one of his sons or daughters, or their issue, after such son or daughter or such their issue should come into possession of the said Gardiner estate,—directed, that, as often as the Gardiner estate should come to the possession of any of his said sons or daughters, or any of their issue, the person next in remainder according to the limitations thereinbefore mentioned to the Clerk Hill estate after the person or persons who should so come to the possession of the Gardiner estate, should be entitled to and come to the possession of the Clerk Hill estate for the estate and interest thereinbefore mentioned and directed to be limited to him or her respectively, and so from time to time as often as that the event then in his (the testator's) contemplation might happen, in such manner as if the person or persons so becoming possessed of the Gardiner estate had died or was then dead without issue; and that the uses for which the Clerk Hill estate was thereinbefore directed to be conveyed should accordingly cease, determine, and shift from time to time, so as the said two estates might never as long as he (the testator) might legally prevent the same consistent with the limitations thereinbefore mentioned in other respects, and before the ultimate remainder or reversion thereinbefore directed to be limited thereof should take place and come into actual possession, be holden or enjoyed in possession by any one of his sons or daughters or their issue together and at the same time.

By a codicil to his will, the testator,—

reciting, that, by the death of his late brother J. W. without issue, he had become entitled for life to the Gardiner estate under the will of Sir W. Gardiner, with remainder to his first and other sons in tail, with divers remainders over in favour of his issue, by which event the Gardiner estate would upon his (the testator's) death descend and go to his eldest son James,—revoked and annulled the limitation in his will mentioned of the Clerk Hill estate in favour of his said son James; it being still his will and intention that the Clerk Hill estate should not be held or enjoyed by any one of his sons or daughters or their issue together with the Gardiner estate.

At the death of the testator, in 1805, his eldest son (James) entered into possession of the Gardiner estate, and in 1807 he suffered a recovery, declaring the uses thereof to himself in fee.

The second son of the testator (Robert), by his guardians (he being then an infant), entered into possession of the Clerk Hill estate; and, soon after he attained his majority, he filed a bill in Chancery, praying that it might be declared that he was entitled to an immediate estate for life in the Clerk Hill estate, with remainder to his first and other sons in tail male; and, in July, 1814, under a decree of the then Master of the Rolls (Sir W. Grant), a conveyance was made accordingly to his first and other sons successively in tail male, and, in default of such issue, to the uses declared by the testator's will.

Robert remained in possession of the Clerk Hill estate down to the time of his death in 1841; and, after the death of the other two sons of the testator, his (the testator's) eldest daughter (the now defendant) entered into possession of the Clerk Hill estate under the limitations contained in the will of her father:—

Held, by Erle, C. J., Willes, J., and Byles, J., that the defendant was not, in the events which had happened, entitled under her father's will to the Clerk Hill estate; for, that the effect of the shifting clause was simply to accelerate the next remainder in tail male, and that it did not affect the subsequent estate in tail general (under which the plaintiff, the eldest son of the testator's eldest son, claimed), which might descend to persons who could not have acquired the Gardiner estate so as to come within the operation of the shifting clause.

Held, by Williams, J., that, on the true construction of the shifting clause, James, the testator's eldest son, must be deemed to have "died without issue," and that consequently the plaintiff, so far as related to the rights of the defendant under the will, must be regarded as a non-existing person.

*Gardiner v. Jellicoe,*

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## DISCOVERY.

See PRACTICE, 3-8.

## DIVINE SERVICE.

See CHURCH-RATE.

## DIVORCE COURT.

Costs in,—see HUSBAND AND WIFE, 1.

## DYEING-WORKS.

See FACTORY ACTS, 1, 2.

## EAST INDIA SERVICE.

See OFFICE.

## ECCLESIASTICAL COURT.

See ARCHDEACONRY COURT.  
PROHIBITION.

## EQUITABLE LIEN.

What amounts to.

A. deposited with B. certain share certificates in a gas company as security for a loan, and afterwards by deed assigned all his personal estate to C. and D., in trust for the benefit of his creditors. The assignees gave notice of the assignment to the company; but B. omitted to give notice of his equitable lien:—Held, that, notwithstanding the omission of such notice, C. and D. could not maintain trover against B. for the share certificates. *Broadbent, app., Varley, resp.*, 214

## EQUITABLE REPLICATION.

See PLEADING.

## EVIDENCE.

*Gross-Examination of a Party to the Cause as to the Contents of a Record or Writing not produced.*

In an action charging the defendant with having made a fraudulent representation as to the price which certain seedsmen in London would give for certain seed, whereby the plaintiff was induced to sell it for a lower price than he otherwise would have done, the defendant, who appeared as a witness, having, in his examination in chief, denied the alleged misrepresentation, was asked on cross-examination whether there had not been proceedings against him in a County Court, at the suit of one A., in respect of a similar claim, which he had resisted, and upon which he had given evidence, and the jury had notwithstanding found their verdict for the then plaintiff. It was objected by the defendant's counsel that the questions relating to the contents of public judicial proceedings, which must be in writing, could not be asked, but that the record must be produced. The objection having been overruled, and the questions allowed to be put,—

Held, by Willes, J., and Keating, J. (dissentiente Byles, J.), that the ruling was correct. *Henman v. Lester*, 776

## EXECUTORS AND ADMINISTRATORS.

*Liability of Executor of Lessee for Repairs.*

1. Although, in respect of rent, the personal liability of an executor of a lessee for years does not exceed the value of the demised premises, this qualification does not extend to a covenant for repairs. *Sleap v. Newman*, 116
2. Plea by an executor, that the demised premises had yielded no profit beyond what he had paid over to the lessor, that the premises came to him only as executor, and that he offered to surrender them before the breaches occurred,—Held (on the authority of *Tremere v. Morrison*, 1 N. C. 89, 4 M. & Scott 603), bad on demurrer. *Id.*

## FACTORY.

What a "Factory" within the meaning of the *Factory Acts*,—see FACTORY ACTS, 2.

## FACTORY ACTS.

*Employment of Children in breach of the Provisions of.*

1. The appellants carried on the business of calico-printers at two places distant from each other seven miles. The business of a calico-printer consists of four processes, viz., bleaching, printing (by impressing the pattern on the bleached cloth by means of mordants), dyeing, and finishing. Three of these processes, viz., the bleaching, dyeing, and finishing, were performed at one branch of the establishment, and the fourth, viz., the printing, at the other:—Held, that a child employed on the premises where the bleaching, dyeing, and finishing were performed, was employed in an "incidental printing process," within the 2d section of the 8 & 9 Vict. c. 39; and that the place where he was so employed formed part of "the establishment where the chief process of printing was carried on," within the meaning of that Act: and, consequently, that the appellants were not liable to be convicted of an offence against the Bleaching Works Act, 23 & 24 Vict. c. 78, in employing him without a schoolmaster's certificate. *Hoyle, app., Oram, resp.*, 124
2. One whose sole business consists in the "finishing" of cotton fabrics, but who neither bleaches nor dyes, is not within the operation of the Bleaching and Dyeing Works Act, 23 & 24 Vict. c. 78. *Howarth, app., Coles, resp.*, 129
3. The "finishing" spoken of in the 7th and 11th sections of that Act refers to the process of finishing which is incidental to dyeing, and not to the dealing with fabrics which are neither bleached nor dyed. *Id.*

4. The 78d section of the Factory Act, 7 & 8 Vict. c. 15, enacts that "the word 'factory,' (notwithstanding any provision or exemption in the Factory Act (3 & 4 W. 4, c. 103), shall be taken to mean all buildings and premises wherein or within the close or curtilage of which steam, water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material or any fabric made thereof;" and "any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in a process incident to the manufacture carried on in the factory, shall be taken to be a part of the factory, although it may not contain any machinery:" and then comes this exception,—"but this enactment shall not extend to any part of such factory used solely for the manufacture of goods made entirely of any other material than those herein enumerated." The appellant was the occupier of premises in Birmingham in which steam-power was used to work machinery employed in manufacturing cotton and wool into "webbing," of which he made men's braces and horses' girths by cutting the material into lengths and sewing pieces of leather and buckles thereto. The buildings formed an enclosed square, entered from the street by a gateway: on the left was the building in which the steam-power was used and the webbing manufactured: on the right, within the curtilage, the manufacture of braces and girths was carried on in rooms entered from the square. One Heeley, a child under 13, was engaged in the last-mentioned manufacture. His occupation was, the preparation of the pieces of leather for attaching to the webbing, by boring holes round the edges with an awl. No part of the webbing was ever placed in his hands or brought into the room; nor was there any machinery in the room where he was so employed. Held, that this was an employment in a "factory," within the meaning of the Factory Acts, and that the appellant was liable to a penalty for a breach of the 30th section of the 7 & 8 Vict. c. 15. *Taylor, app., Hickes, resp.*, 152

#### FEEES.

*Registrar's Fees in the Archdeaconry Court,—*  
see ARCHDEACONRY COURT.

#### FERRY.

##### *Right of.*

1. A ferry is the exclusive right to carry passengers across a river or arm of the sea from one vill to another, or to connect a continu-

ous line of road leading from one township or vill to another, and not a servitude imposed upon a district or large area of land; and is wholly unconnected with the ownership or occupation of land. *Newton v. Cubitt*, 32. [Affirmed on error.]

2. In an action for the infringement of the plaintiffs' ancient ferry, the declaration contained a count for carrying in the line of the plaintiffs' ferry, and a count for carrying near thereto for the purpose of evading it. No grant was forthcoming; but, in an ancient deed (1676), conveying the ferry to those under whom the plaintiffs claimed, it was described as "all that ferry and ferry place commonly called or known by the name of Potter's Ferry, with all the ferryage, &c., for men, horses, &c., over the river Thames, lying, being, and extending itself from a place or marsh called the Isle of Dogs, over the said river Thames into the town of Greenwich, in the county of Kent." The evidence of user went to establish a right of ferry in the plaintiffs and those under whom they claimed, from a point in the Isle of Dogs called Potter's Ferry Stairs to Greenwich; and it appeared, that, down to the year 1812, there was but one public road across the island, viz. from Poplar to Potter's Ferry, but that, since that time, a great number of houses and factories had been built upon the island. The defendants erected a pier on their own land, and on the shore adjacent, about 1280 yards from Potter's Ferry Stairs, and by means of a steamboat carried passengers therefrom to Greenwich and other places on the opposite side of the river: and this the jury found to have been done with the bonâ fide object and intention of affording necessary accommodation to the inhabitants of the new district (who were about 3000 in number), and not with any intention of diverting passengers from the plaintiffs' ferry, or in any way interfering with the rights of its owners. There was no public road leading from this new district to Potter's Ferry Stairs. Upon a special case setting forth these facts,—Held, that the evidence therein disclosed only established a right of ferry from Potter's Ferry Stairs to Greenwich, and not from the whole of the Isle of Dogs (as claimed), and did not show an actionable disturbance of the plaintiffs' ferry, notwithstanding the defendants might occasionally have carried a person who came from Poplar. *Id.*

#### FINISHING-WORKS.

See FACTORY ACTS, 1, 2, 3.

#### FREEHOLD OFFICE.

*Fees of,—*see ARCHDEACONRY COURT.

#### FUNERAL EXPENSES.

See HUSBAND AND WIFE, 2.

GAME.

*Property in.*

1. Held,—on the authority of *Rigg v. The Earl of Lonsdale*, 1 Hurlst. & N. 923,†—that the owner of land has a property in game killed thereon. *Blades v. Higge*, 501. (Affirmed on appeal.)

*Trespass in Pursuit of.*

2. A., being upon his own land (or land upon which he was privileged to shoot), fired at and killed a pheasant in the land of B., and went upon B.'s land (without leave) and picked it up:—Held, a trespass "in search or pursuit of game," within the 1 & 2 W. 4, c. 32, s. 30,—the whole being one continuous act. *Osbond, app., Meudowe, resp.*, 10

GRANT IN GROSS.

*See* PRESCRIPTION.

GUARANTEE.

*Construction of.*

1. Held, that a guarantee to secure moneys to be advanced to a third party on discount, to a certain extent, "for the space of twelve calendar months," is countermandable within that time. *Offord v. Davies*, 748
2. But see *Bradbury v. Morgan*, 31 Law J., Exch. 462. *Id.*

HOUSES.

*Numbering,—see* METROPOLIS LOCAL MANAGEMENT ACT.

HUSBAND AND WIFE.

*Liability of Husband for Necessaries supplied to the Wife.*

1. *Costs in Divorce Court.*—The husband is liable to an action at the suit of his wife's solicitor, for costs necessarily incurred by her in filing a petition in the Divorce Court for a judicial separation on the ground of cruelty and adultery, although the petition is not proceeded with, and the course prescribed by the practice of the Divorce Court for obtaining the wife's costs has not been pursued. *Rice v. Shepherd*, 332

*Liability of Husband for the Wife's Funeral Expenses.*

2. The defendant's wife many years ago voluntarily left his house, and went to reside at her brother's, about a mile distant, where she continued to live apart from her husband until her death, when her brother, without any communication with the husband, buried her in a suitable manner:—Held, that the brother was entitled to sue the husband for the expense of the funeral. *Bradshaw v. Beard*, 344.

*Covenant for an Annuity to the Wife.*

2. A decree of dissolution of marriage by the C. B. N. S., VOL. XII.—33

Divorce Court, on the ground of adultery, is no answer to an action by the wife's trustee upon a covenant by the husband to pay her an annuity, contained in a deed of separation which recites the wife's acknowledgment of the adultery, which was afterwards made the foundation of the suit in the Divorce Court. *Goslin v. Clark*, 681

IMMEMORIAL USAGE.

*See* ARCHDEACONRY COURT.

"INCIDENTAL PRINTING PROCESS."

*See* FACTORY ACTS, 1.

INCOME TAX.

*Construction of 5 & 6 Vict. c. 35, s. 73.*

- A. in 1807 (when the old Income-tax Act, 46 G. 3, c. 65, existed) leased premises to B., at a rent of 340*l.*, with a proviso that the rent should be reduced to 330*l.* in the event of "the said tax called income-tax" becoming repealed, annihilated, or suspended at any time during the continuance of the demise; such reduced rent to continue to be paid only so long as the income-tax should remain repealed and not payable:—Held, that the rent which had so become reduced on the expiration of the old income-tax, was restored to the original amount on the passing of the new Income-tax Act, 5 & 6 Vict. c. 35,—there being nothing in the 73*d* section of that Act to render the covenant illegal. *Colbron v. Travers*, 181

INFANCY.

*Debt fraudulently contracted.*

- A replication, "on equitable grounds," to a plea of infancy, that the defendant fraudulently contracted the debt by means of a false and fraudulent representation that he was of full age, is bad, on the ground of departure, and disclosing no answer in equity. *De Roo v. Foster*, 372

INNKEEPER.

*Lien of.*

1. A man goes to an inn, with two race-horses and a groom, in the character of guest. They remain there for several months, taking the horses out every day for exercise and training, and being occasionally absent for several days together at races in different parts of the country, but always with the intention of returning to the inn:—Held, that, in the absence of evidence of any alteration in the relation of the parties, that of innkeeper and guest must be presumed to continue; and that the occasional absences did not destroy the innkeeper's lien upon the horses for his bill. *Allen v. Smith*, 638
2. Held also, that the fact of the innkeeper's having claimed a lien for the whole time,

when in truth he was entitled for a part of it only, was not such an excess of claim as to dispense with a tender of that which was really due. *Allen v. Smith*, 638  
[Affirmed on appeal.]

### INTERPLEADER ISSUE.

*Interrogatories on.*

Interrogatories may be delivered on an interpleader issue. *White v. Watts*, 267

### INTERROGATORIES.

*Under 17 & 18 Vict. c. 125, s. 51,—see PRACTICE, 2-8.*

### ISLE OF DOGS FERRY.

*See FERRY.*

### JOINT STOCK COMPANY.

*Registration of.*

1. Held,—upon the authority of *The London Monetary Advance and Life Assurance Company v. Smith, 3 Hurlst. & N. 543,†*—that an insurance Company (registered under the 7 & 8 Vict. c. 110), which professed to be established for the following purposes,—“1. The granting of policies of insurance upon lives or survivorships,—2. The granting of endowments to children and adults,—3. The granting of annuities, to commence either immediately or prospectively, and to continue either for a definite time or until death,—4. The assurance to persons of both sexes a weekly sum or payment during sickness, and to married women a certain weekly sum during the period of accouchement, either with or without medical attendance and medicine,—5. The granting loans and making advances upon personal or other security, so as the interest made payable upon any such loan or advance shall not exceed 7½ per cent.; and the doing of all acts incident thereto,”—was disqualified, by reason of the enactments contained in the 27th and 28th sections of the 20 & 21 Vict. c. 14, from suing either at law or in equity, unless registered under the Joint Stock Companies Acts, 1856, 1857. *The London and Provincial Provident Society v. Ashton*, 709  
[Judgment reversed on error, 723.]

*Contracts by.*

2. A contract made between the projector and the directors of a joint stock Company provisionally registered, but not in terms made conditional on the completion of the Company, is not binding upon the subsequently completely registered Company, although ratified and confirmed by the deed of settlement. *Gunn v. The London and Lancashire Fire Insurance Company*, 894

### JUDGE'S ORDER.

*Setting aside.*

The defendant, having been arrested on a ca. sa. after the plaintiff had proved his debt under a fiat against him, applied by summons for his discharge, and to set aside the ca. sa. The Judge made the order, imposing as a term that the defendant should bring no action. Having assumed himself of the order so as to obtain his discharge,—Held, that the defendant could not afterwards move to set aside so much of it as restrained him from bringing an action. *Hayward v. Duff*, 364

### JUSTICES.

*Appeals against Decisions of.*

1. *Costs.*—The Court will not give the respondent costs on dismissing an appeal against a decision of justices, where the question is a fairly arguable one. *Caswell, App., Cook, resp.*, 242
2. Nor will they listen to an application for that purpose in the term after the decision. *Id.*

### LANDLORD AND TENANT.

*Surrender by Operation of Law.*

1. An agreement by landlord and tenant that the term shall be put an end to, acted upon by the tenant's quitting the premises, and the landlord by some unequivocal Act taking possession, amounts to a surrender by operation of law. *Phené v. Poppewell*, 334
2. Where, therefore, the tenant left the key at the counting-house of the landlord, and the latter, though he at first refused to accept it, afterwards put up a board to let the premises, and used the key to show them, and painted out the tenant's name from the front:—Held, sufficient evidence of a surrender by operation of law. *Id.*

### LETTERS PATENT.

*Construction and Validity of Specification.*

1. The application of a known article to a purpose analogous to those to which it had before been applied, is not the subject of a patent,—although the result of its application to the new purpose may be the production of a known machine in a cheaper or better manner. *Horton v. Mabon*, 437
2. For instance, the application of “double angle-iron,” a well-known article, to the formation of hydraulic cups or joints to telescopic gasholders, instead of forming them, as had theretofore been done, by riveting two pieces of single angle-iron to a plate. *Id.*

### LEX LOCI CONTRACTUS.

*See RAILWAY COMPANY, 1.*

### LIEN.

*See EQUITABLE LIEN.*  
**INNKEEPER.**

## LIGHTS.

See ANCIENT LIGHTS.

## LOCAL MANAGEMENT.

See BOARD OF WORKS.

## LONDON.

Custom of.

The custom to rebuild to any height upon ancient foundations in the city of London, is destroyed by the 3d section of the Prescription Act, 2 & 3 W. 4, c. 71. *Cooper v. Hubbuck*, 456

## LORD CAMPBELL'S ACT.

See NEGLIGENCE.

## MAGISTRATES.

See JUSTICES.

## MEMORANDA.

Queen's Counsel.

Hindmarch, Boden, Phipson, 1.

## METROPOLIS LOCAL MANAGEMENT ACT.

Construction of 18 & 19 Vict. c. 120, s. 141.

1. *Naming and numbering streets and houses.*—Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the legislature co-exist, the earlier must necessarily be repealed by the later statute. *Daw v. The Metropolitan Board of Works*, 161
2. The 145th section of the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), as to the naming of streets and numbering of houses in the city of London, is repealed by the general provision for that purpose contained in the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 141. *Id.*

And see BOARD OF WORKS.

## MISDIRECTION.

See NEGLIGENCE.

## NECESSARIES.

See HUSBAND AND WIFE, 1.

## NEGLECTANCE.

What sufficient Evidence of.

1. No action will lie for the consequences of a negligent act, where the party complaining has by his own want of due care and caution been in any degree contributory to the misfortune. *Witherley v. The Regent's Canal Company*, 2
2. A swing-bridge over a canal crossing a public highway, when turned back for the passage of a barge along the canal, left a gap on the side of the road without any fence towards the water. A., being upon the bridge whilst it was in this state, and the spot being

dark, incautiously stepped back and fell into the water and was drowned. In an action by his widow and administratrix against the canal company (under Lord Campbell's Act, 9 & 10 Vict. c. 93), the jury were told, that if they thought there had been negligence on the part of the company, and no want of proper care and caution on the part of the deceased, the plaintiff was entitled to a verdict; but that, if they thought that the deceased had by his own negligence contributed to the accident, they must find for the defendants:—Held, a proper direction, and that, upon the facts, the jury were warranted in finding for the defendants, although they were of opinion that the bridge was not secured as it should have been. *Witherley v. The Regent's Canal Company*, 2

And see BOARD OF WORKS.

## NEW TRIAL.

Insufficient Damages.

1. *Before the sheriff.*—The Court will not grant a new trial (before the sheriff) where the sum sought to be recovered is less than 5*l.*, merely because the question involved is one of importance to the plaintiff. *Lee v. Evans*, 368

Perverse Verdict.

2. The jury having found a verdict for five guineas in an action for a trifling assault, evidently acting upon information given to them by the plaintiff's counsel that a verdict for less would not give the plaintiff her costs,—The Court granted a new trial without imposing any terms. *Poole v. Whitcomb*, 770

## OFFICE.

Contract for the Sale of.

A contract for the payment of money in consideration of the resignation of a majority in the service of the East India Company, is illegal by the 49 G. 3, c. 126. *Eyre v. Forbes*, 191

## ORDER AND DISPOSITION.

See BANKRUPT, 1.

## PACKED PARCELS.

See RAILWAY COMPANY, 2.

## PATENT.

See LETTERS PATENT.

## PLEADING.

Equitable Replication.

A replication, "on equitable grounds," to a plea of infancy, that the defendant fraudulently contracted the debt by means of a false and fraudulent representation that he was of full age, is bad, on the ground of departure, and disclosing no answer in equity. *De Roo v. Foster*, 272

## POLL.

*Demand of,*—see PROHIBITION.

## POUNDAGE.

See SHERIFF.

## PRACTICE.

*Process.*

1. *Leave to proceed under 15 & 16 Vict. c. 76, s. 18.*—A writ of summons having been issued against a person who professed to carry on the business of a carrier in London, having an office and an agent there who received and forwarded goods to all parts of the kingdom, a Judge at Chambers,—upon an affidavit stating these facts, and that a copy of the writ had been served upon the agent, and alleging that the plaintiff had made all reasonable efforts and used all due means in his power to serve the defendant personally, but had not been able to do so, and that he verily believed that the writ had come to the knowledge of the defendant, and that he evaded service thereof,—made an order for leave to proceed, under the 18th section of the Common Law Procedure Act, 1852:—The Court refused to set aside the order, upon a mere affidavit by the agent (the defendant himself making none), that the defendant, at the time of the commencement of the action, and long prior thereto, was and still remained resident at Edinburgh, out of the jurisdiction of this Court, and had no residence except in Scotland, and did not and never did reside at the London house, which was only a branch-office for the receipt and despatch of goods,—not being satisfied that the defendant was not in London at the time of the issuing of the writ. *Naef v. Mutter*, 816

2. Whether the order might not under the circumstances have been sustained, even if it had clearly appeared that the defendant actually resided and was in Scotland at the time of the issuing of the writ,—*quare*. *Id.*

*Interrogatories under 18 & 19 Vict. c. 125, s. 51.*

3. It is no ground of objection to interrogatories under the 51st section of the Common Law Procedure Act, 1854, that the answers, if given in the affirmative, would render the party interrogated liable to a criminal prosecution, though it may be ground for refusing to answer. *Bartlett v. Lewis*, 249
4. *Seem*, that the statute does not in all respects place interrogatories upon the footing of bills for discovery in Courts of equity. *Id.*
5. Remarks upon *Osborn v. The London Dock Company*, 10 Exch. 698,† and *Tupling v. Ward*, 6 Hurlst. & N. 749.† *Id.*
6. *Affidavit in support of.*—The affidavit in support of an application for leave to deliver interrogatories, must state that the party will derive benefit in the cause from the discovery

which he seeks. *Oxlade v. The North Eastern Railway Company*, 350

7. *Plaintiff suing in person.*—But, where the party sues or defends in person, the affidavit of an attorney or agent will be dispensed with. *Id.*

8. *Interpleader issue.*—Interrogatories may be delivered on an interpleader issue. *White v. Watts*, 267

*Setting aside Judge's Order.*

9. The defendant, having been arrested on a ca. sa. after the plaintiff had proved his debt under a fiat against him, applied by summons for his discharge, and to set aside the ca. sa. The Judge made the order, imposing as a term that the defendant should bring no action. Having availed himself of the order so as to obtain his discharge,—Held, that the defendant could not afterwards move to set aside so much of it as restrained him from bringing an action. *Hayward v. Duff*, 384

## PRESCRIPTION.

*To cut Timber in alieno solo.*

- A claim of a prescriptive right in the owners or occupiers of close A. to enter close B. (belonging to a third person), and to cut down and carry away and convert to their own use all the trees and wood growing and being thereon, “as to the said close A. appertaining,” is void, as being too large. *Bailey v. Stephens*, 91

## PRESCRIPTION ACT.

See ANCIENT LIGHTS.

## PRINCIPAL AND SURETY.

*Discharge of Surety by Time given to the Principal Debtor.*

1. To a declaration upon a joint and several promissory note given to the plaintiff by the defendant and one J. E., payable on demand, the defendant pleaded, for defence on equitable grounds, that he made the note jointly with J. E. for the accommodation of the said J. E., and as his surety only, to secure payment of a loan made by the plaintiff to J. E., and that, before and at the time when the note was made, the plaintiff, having notice of the premises, agreed with the defendant, in consideration of his making the note as such surety as aforesaid, that the plaintiff would call in and demand payment of the note from J. E. within three years from the date thereof; that the plaintiff, at the time of making the note, with intent to carry out the agreement, and with the assent of the defendant and J. E., wrote on the back of the note as follows,—“Memorandum: this note is to be paid off within three years from date;” that the memorandum was signed by J. E., but that, by mis

take of all the parties, it was omitted to be mentioned in the memorandum that the plaintiff was to call in and demand payment of the note from J. E. within the three years; and that the plaintiff neglected to demand or call in payment of the note within the period aforesaid, whereby he lost the means of obtaining payment from J. E., who had since become and was insolvent:—Held, that this plea disclosed a good equitable defence to the plaintiff's demand against the defendant. *Lawrence v. Walsley*, 799

2. To an action by the payee against one of two makers of a promissory note, the defendant pleaded that he made the note jointly with one E., for the accommodation of E., and as his surety only, to secure payment of a loan of 200*l*. then made by the plaintiff to E., and that, at the time of the note being made and signed by the defendant and E., a memorandum was by agreement between the plaintiff, E., and the defendant, endorsed upon the note, and signed by E., in the following words, "Memorandum: This note is to be paid off within three years from date: J. E.," and that the plaintiff did not compel payment of the note within the period of three years, which elapsed before the commencement of the suit:—Held, on motion for judgment non obstante veredicto, that this plea afforded no defence. *Lawrence v. Walsley*, 811

#### PRINT-WORKS.

See FACTORY ACTS, 1.

#### PROHIBITION.

*Against proceeding in the Ecclesiastical Court.*

1. The only legitimate way in which a parish can express its desire to do an act, is, by convening a vestry, and duly conducting the proceedings therein to their legal termination,—viz. by show of hands, or by a poll when a poll is duly demanded. *White v. Steele*, 883
2. A meeting of vestry was held for the purpose of considering the propriety of purchasing an additional burial-ground for the parish of P. A resolution to that effect having been put and agreed to by the majority of those present, a poll was demanded, and refused. The resolution of the vestry was communicated to the Church Building Commissioners, who thereupon authorized the parish to purchase the land and to levy rates to defray the expenses, under the 45 G. 3, c. 134, s. 25, and 3 G. 4, c. 72, s. 26. Money was accordingly borrowed by the churchwardens, and a rate made. A parishioner declining to pay the rate, on the ground of invalidity, the churchwardens instituted against him a suit in the Consistory Court, in which suit the respondent tendered a responsive allegation, stating that at the

vestry a poll had been duly demanded, and refused. The Judge of the Consistory Court having declined to admit this responsive allegation, the respondent appealed to the Court of Arches, by which Court the decision of the Court below was confirmed. Upon an application to this Court for a writ of prohibition, on the ground that the Judge of the Consistory Court had improperly refused to receive the responsive allegation,—the applicant was directed to declare in prohibition; and, he having so done,—Held, that there had been no legal expression of the desire of the parish, and consequently that the responsive allegation ought to have been admitted to proof in the Ecclesiastical Court. *White v. Steele*, 883

3. An appeal from the Consistory Court to the Court of Arches is no bar to an application for a prohibition. *Id.*

#### PROMOTIONS.

See MEMORANDA.

#### PUBLIC HEALTH ACT.

See SET-OFF.

#### PUBLIC WORKS.

See BOARD OF WORKS.

#### RAILWAY COMPANY.

*Where charged as Common Carriers.*

1. *Carrying to a place out of the kingdom.*—The legality of a contract is determined by the *lex loci contractus*. *Branley v. The South Eastern Railway Company*, 63
2. A railway company incorporated for the conveyance of passengers and goods from London to Folkestone under Acts of Parliament which prohibited them from making unequal charges, obtained another Act enabling them to establish a communication by steam-vessels with Boulogne, which last-mentioned Act contained no provision as to equality of rates for the carriage of goods. There was nothing in the law of France which disabled the Company as public carriers from making such contracts for that purpose as they might think most for their own interest. The Company by their tariff charged certain rates for small parcels, with a double charge for "packed parcels:—"Held, that, so far as regarded the contract for the carriage of such parcels from Boulogne to London, there was nothing illegal in this increased charge. *Id.*
3. *Goods deposited at the cloak-room.*—The plaintiff, a passenger by the South Eastern Railway, on arriving at the terminus at London Bridge, deposited in the cloak-room there a bag containing wearing apparel and jewellery to a value considerably exceeding 10*l*., receiving as a voucher a ticket on the

back of which was printed the following notice:—"The Company will not be responsible for articles left by passengers at the station, unless the same be duly registered, for which a charge of 2d. per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1d. per diem, in addition, will be made on all articles left in the cloak-room for a longer period than twenty-four hours. The Company will not be responsible for any package exceeding the value of 10l." A similar notice printed in large characters was posted up in the office; but the plaintiff swore that she did not see it. She was not asked whether or not she had seen the notice on the back of the ticket; but she produced it when she applied for the bag. Through the negligence of the Company's servants, part of the contents of the bag were abstracted whilst it was in their custody:—Held, that the Company, having received the deposit, not as carriers, but as ordinary bailees, upon the terms contained in the printed notice,—which the plaintiff, having the means of ascertaining them, must be taken to have consented to be bound by,—were not responsible for the loss; and that the case was neither within the Carriers' Act (11 G. 4 & 1 W. 4, c. 68), nor the Railway Traffic Act, 17 & 18 Vict. c. 31. *Van Toll v. The South Eastern Railway Company*, 75

#### *Injunction under the Railway Traffic Act.*

4. *Time of closing station.*—Injunction against a railway Company under the 17 & 18 Vict. c. 31, to restrain them from requiring other carriers to bring their goods to the railway station at an earlier hour than they received their goods delivered at their own receiving-offices. *In re Bazendale and The London and South Western Railway Company*, 758

5. *Costs.*—Where a railway Company has so acted as to render it necessary and proper for any person to come to the Court for redress under the Railway and Canal Traffic Act, the Court will, as a general rule, make the rule absolute with costs. *Id.*

#### RECORD.

*Cross-examination as to the Contents of,—see EVIDENCE.*

#### REPAIRS.

*See COPYHOLD.*

*Liability of Executor of Lessee for,—see EXECUTORS AND ADMINISTRATORS.*

#### RESIGNATION OF OFFICE.

*See OFFICE.*

#### REWARD.

##### *Advertisement of.*

A police constable apprehended a boy (in Bedfordshire) having in his possession a horse and gig under circumstances of suspicion, and, discovering that the boy had absconded with them from Woolwich, gave notice to his superintendent, who within a reasonable time gave notice to the defendant, the boy's master. After the boy's apprehension, but before the master received notice thereof, the latter had issued an advertisement offering a reward of 10l. to any one who would give such information as should lead to the recovery of the property and the apprehension of the thief:—Held, that a plea charging the police constable with a breach of duty in neglecting to inform the defendant of the boy's apprehension until after the issuing of the advertisement, was no answer to an action by the constable for the reward. *Neville v. Kelly*, 740

#### SALE, BILL OF.

*See BILL OF SALE.*

#### SALE OF OFFICE.

*See OFFICE.*

#### SET-OFF.

##### *Mutuality of Accounts.*

1. The corporation of P. (who besides their municipal character filled those of managers of the public baths and washhouses under the Baths and Washhouses Act, 1846, and of the local board of health under the Public Health Act, 1848), kept three separate accounts at their bankers, viz.: 1. "The Corporation Baths and Washhouses Revenue Account," 2. "The P. Local Board of Health Account." Upon the first account they were indebted to the bank, and upon the other two the bank was indebted to them in an equal amount. In an action brought by the banker to recover the balance due to him on account No. 1,—Held, that the corporation were entitled to set off the debts due to them on the other two accounts. *Podder v. The Mayor, &c., of Preston*, 535

##### *Equitable Answer to.*

2. To an action for non-payment of 45l., the balance due upon a building agreement, the defendant pleaded a set-off of a judgment for 40l. 2s. obtained by him in an action against the plaintiff. To this plea the plaintiff replied, that, before the recovery of the said judgment, he for a good consideration assigned the debt of 45l. to one J. S.; that the defendant before the recovery of the judgment had notice of the assignment; and that he (the plaintiff) was suing as trustee for J.

**S.** :—Held, that the replication was bad, as disclosing no legal answer to the plea. *Watkins v. Clark*, 277

## SETTLEMENT.

See APPRENTICE.

## SEWER.

See BOARD OF WORKS.

## SHERIFF.

Where entitled to Poundage.

The sheriff is not entitled to poundage, where, after seizure and before sale, the judgment and all subsequent proceedings are set aside for irregularity. *Miles v. Harris*, 550

And see NEW TRIAL.

## SHIPPING.

Bill of Lading.

1. A. contracted to sell to B. a specific cargo of wheat, described in the bought and sold note as "shipped per Diletta Mimbella, as per bill of lading dated September or October," and which was all on board at the date of the contract :—Held, that this did not necessarily entitle the buyer to rescind the contract on its turning out that all the wheat was not shipped before the bill of lading was given. *Gattorno v. Adams*, 560

Charter-party.

2. A ship was chartered on the 12th of September, 1861, for the conveyance of a cargo of wheat from Harwich to St. Malo; ten days to be allowed for loading. The usual course was to load a portion of the cargo at a quay in the river Orwell, and to proceed lower down the river to take in the residue. The vessel having arrived on the 14th of September, and taken in 900 quarters (which was about three-fourths of the whole cargo), was proceeding down the river in charge of a pilot, when she got aground. The master, finding it necessary to take out the cargo in order to examine and repair the ship, gave notice to the charterers' agent, who accordingly, at the request of the master, and at the expense of the charterers, unloaded the 900 quarters, and despatched the whole quantity to its destination by other vessels. On the 4th of October, the master gave notice that he was ready to receive the cargo, and demanded it. The agent had none to ship :—Held, that the owner could not, under the circumstances, maintain an action against the charterers for not supplying a cargo. *Strugnell v. Friedrichsen*, 452

## SOUTHAMPTON PIER ACT.

Construction of.

Steam-vessels plying between the river Itchen, at Southampton, and the Isle of Wight, are

bound, under the Southampton Pier Act, 1 & 2 W. 4, c. i. s. 56, to call at the Royal Pier at Southampton when requested by five passengers to do so. *Farrand, app., Cooper, resp.*, 283

## STOCK.

Contract to replace,—see BANKRUPT, 2.

## STREETS.

Naming,—see METROPOLIS LOCAL MANAGEMENT ACT.

## SURETY.

See PRINCIPAL AND SURETY.

## SURRENDER.

By Act and Operation of Law,—see LANDLORD AND TENANT.

## TENDER.

See INNKEEPER.

## TIMBER.

Custom to fell otherwise than for Repairs,—see COPYHOLD.

Grant of, in alieno solo,—see PRESCRIPTION.

## TRESPASS.

In pursuit of Game,—see GAME, 2.

## USAGE.

See ARCHDEACONRY COURT.

## VESTRY.

See PROHIBITION.

## VISITATION FEES.

See ARCHDEACONRY COURT.

## WASTE.

See COPYHOLD.

## WILL.

Revocation by obliterating the Seal.

1. A will is not revoked by mere abandonment: to operate a revocation, there must be some unequivocal act of cancellation or obliteration by the testator himself or by some person in his presence and by his direction. *Andrew v. Motley*, 514
2. A will (about seventy years old) executed under seal, and published and attested as a sealed instrument, was proved to have been in the keeping of the person entitled under it as tenant for life, and he was shown to have treated it as his title-deed, and, shortly before his death, to have desired a person to read it over in order to see whether he was empowered by it to dispose of the property by his will :—Held, that it was properly received in evidence, as a document coming

from a custody where it might reasonably be expected to be found,—notwithstanding its appearance was calculated to lead to a suspicion (which, however, the jury negatived) that it had been cancelled by the testator after its execution. *Andrew v. Motley*, 526

*Attestation.*

3. *Semble*,—per Williams, J.,—that, where the attestation clause of a will more than thirty years old recites a compliance with the requisite ceremonies in respect of all the witnesses, it is enough, in order to make out a *prima facie* case, to prove the death of all and the handwriting of one of them; because it will be presumed that everything that he thus declared by his attestation to have been done was rightly done. *Id.*

WINDOWS.

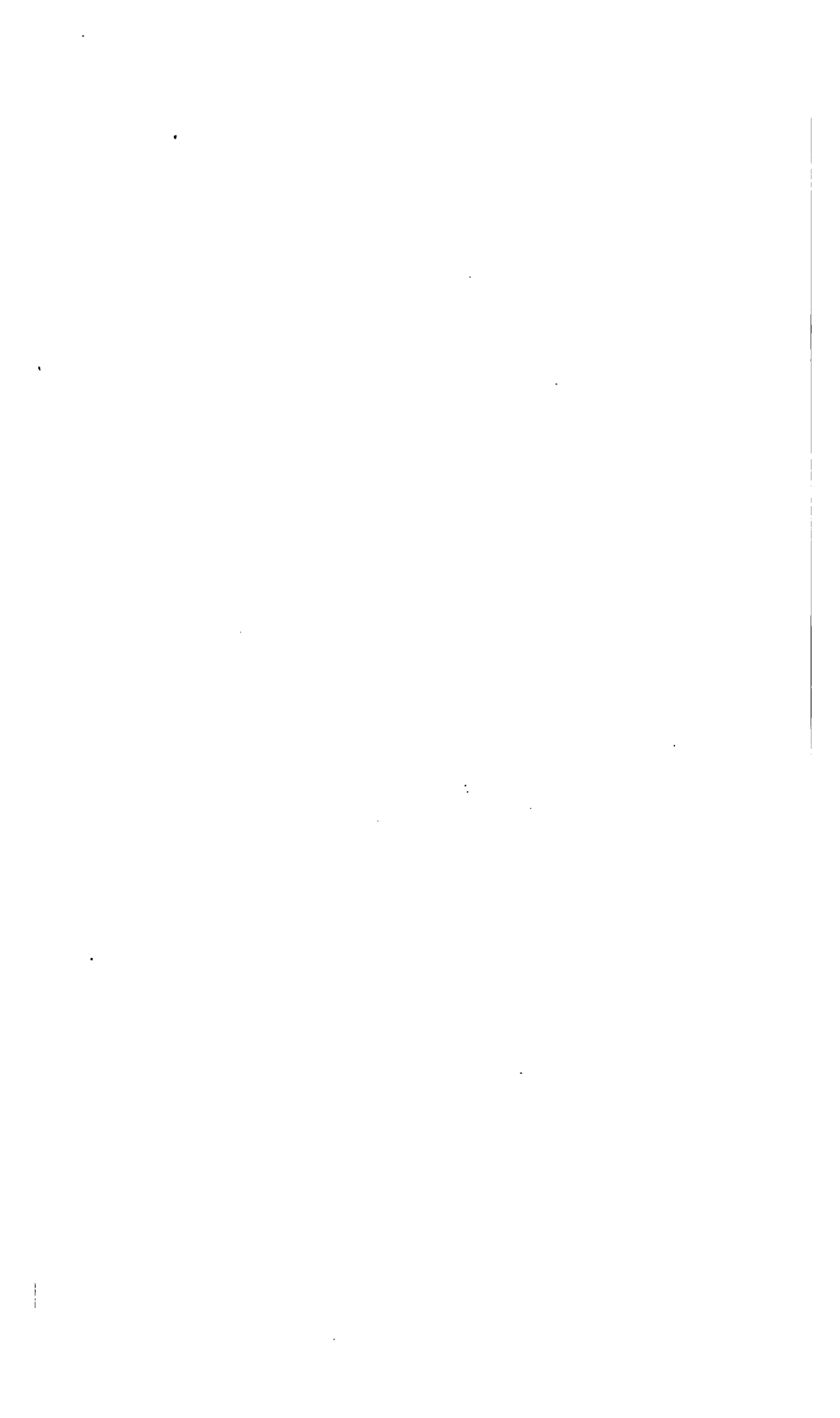
*See ANCIENT LIGHTS.*

WITNESS.

*Privilege cundo et redeundo.*

1. Where a defendant had been taken on a *ca. sa.* as he was leaving the Insolvent Debtors' Court, his petition having been adjourned *sine die*, without protection,—the Court refused to discharge him without his undertaking to bring no action against the sheriff. *Andrews v. Martin*, 371
2. And, held, that the fact of his having delayed his application for six months was no objection. *Id.*

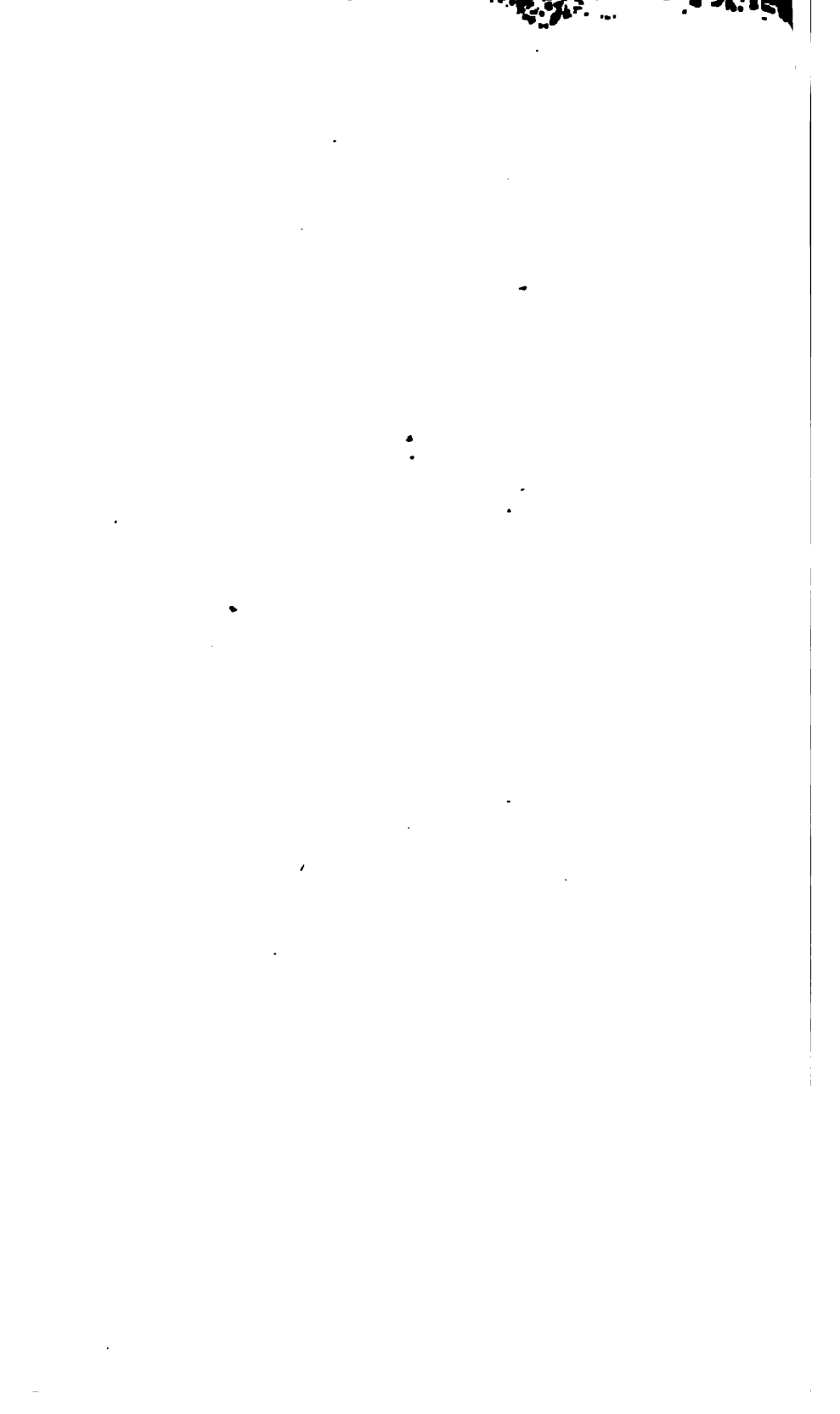












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